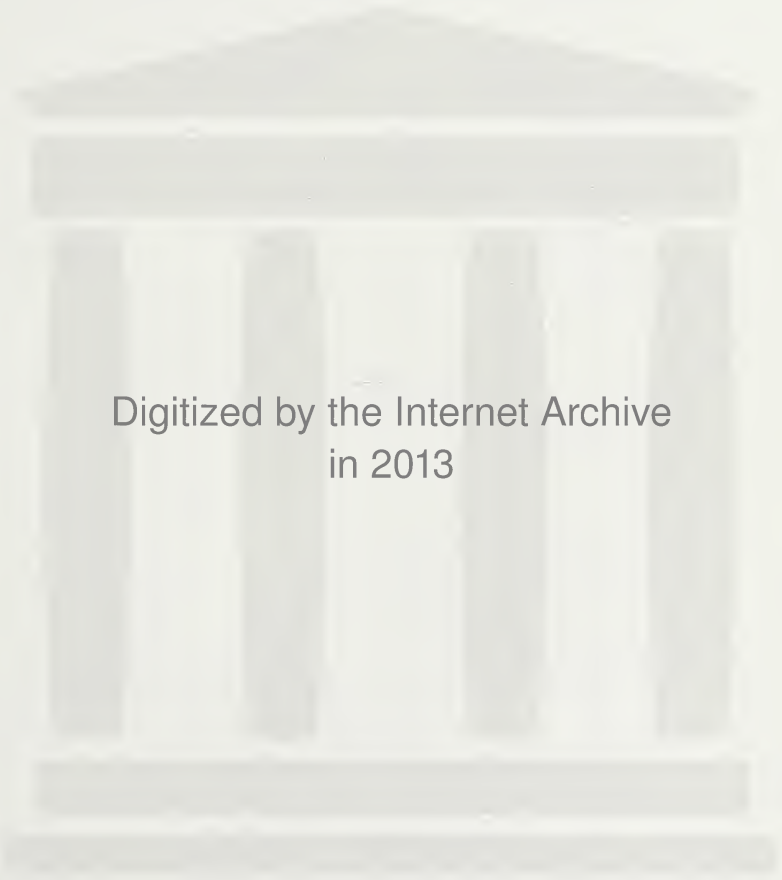

THE STATE OF RESEARCH IN ANTITRUST LAW

HERBERT L. PACKER
Stanford University

WALTER E. MEYER RESEARCH INSTITUTE OF LAW
1963

THE STATE OF RESEARCH IN ANTITRUST LAW

HERBERT L. PACKER
Stanford University

WALTER E. MEYER RESEARCH INSTITUTE OF LAW
1963

Walter E. Meyer Research Institute of Law, Inc.
127 Wall Street
New Haven, Connecticut

FOREWORD

The Walter E. Meyer Research Institute of Law is a New York non-profit membership corporation created pursuant to a direction in the will of the late Walter E. Meyer of the New York Bar who died in January, 1957. The purpose of the Institute, in the language of the will, is

> . . . through investigation, research and study and through the publication of the results . . . to throw light on matters which will be of aid in securing to humanity a greater degree of justice whether through the law as administered by the courts, through legislation, through government, local, national or international, or through a better understanding only of human relations.

Since Mr. Meyer in his will placed so much reliance on the efficacy of "investigation, research and study" to advance the realization of "a greater degree of justice," the Trustees of the Walter E. Meyer Research Institute of Law decided that one of their first tasks should be to have made a critical examination and evaluation of research activities in the United States which relate to legal institutions and processes. "The State of Research in Antitrust Law" is one of several surveys on research in representative fields of law, which were

commissioned by the Institute with this objective in view. These monographs will be drawn on by the Director of the Institute in conducting the comprehensive legal research study for which he is responsible. That study and the proposed monographs are described in the Report of the Meyer Institute for the period from its organization in 1957 to June 30, 1960 (copies of this Report, as well as one for 1960-1962, are available from the office of the Institute at 127 Wall Street, New Haven, Connecticut).

Professor Packer, once the scope of his inquiry had been agreed upon, had full freedom to pursue his investigations and form his own conclusions. The Meyer Institute, though interested in the study and its findings, does not necessarily endorse any positions taken by the author.

It is the desire of the Institute to obtain a wide circulation for this and other monographs, in the hope of eliciting comment and discussion which will be of value to those engaged in legal research and scholarship. More particularly, it is hoped that the content and conclusions of the general survey of legal research

will be improved by discussion stimulated by these monographs. Accordingly, publication of critical reviews in appropriate journals will be welcome; and correspondence with either the author or with the undersigned Director of the Institute is invited.

Ralph S. Brown, Jr.

March, 1963

PREFACE

This study was commissioned in September of 1959. A first draft, based upon a systematic survey of the literature through September 1960, was completed in October of that year. For a variety of reasons immediate publication was not feasible. When publication arrangements were made it became necessary to take account of intervening developments. This was done in an Addendum, prepared in the spring of 1962. Although the study as a whole has been substantially revised since the preparation of the first draft, in response to the helpful comments of several antitrust scholars to whom it was shown, it continues to speak as of 1960, a fact that may explain what might otherwise appear to be inexplicable omissions.

TABLE OF CONTENTS

I. INTRODUCTION

A preliminary problem of definition confronts any attempt to analyze the state of research in antitrust law. What do we mean by "antitrust law"? How do we distinguish it from trade regulation, unfair competition, government regulation of business, etc., etc.? The following definitional exegesis by Professor Rahl is a good starting point:

> "The common thread of thought to hold together both antitrust and traditional unfair competition . . . is that all concern competition. The thesis is that antitrust is concerned with compelling competition, and unfair competition is concerned with setting a decent plane for competition -- curbing its uglier tendencies. The assumption is that unfair competition works on the same team as antitrust, though at the other end of the field, in that it deters the self-destructive impulses of competition and curtails the means of predatory monopoly growth.
>
> I think that this compelling assumption needs reexamination. . . . It is entirely possible that the two are presently held together more by the word, "competition," than by the idea. In fact, each of the two subjects has its own idea. Antitrust is the product of the idea that competition is a goal and is something that should be actively protected and promoted as a matter of public policy. Unfair competition law, however, is primarily concerned with the tort idea of protection of private

> interests (personality, property, relational) from unwarranted invasion by certain methods of doing business. . . .
>
> It is true that setting a plane of competition sometimes does have a direct bearing upon the goal of maintaining competition. This is illustrated by many Section 2 Sherman Act proceedings; that section has always had a strong unfair competition content. Also, the Federal Trade Commission was clearly meant to deal with "plane of competition" cases having antitrust implications. And sometimes, the legal setting of the plane of competition operates to interfere directly with the objective of maintaining competition -- as with resale price maintenance laws and much of Robinson-Patman. . . ."[1]

Of course the law of antitrust cannot be viewed as simply and precisely oriented toward a single goal. Indeed, much of the confusion that pervades work in the field arises from a failure explicitly to recognize the presence of a diversity of goals, many of them mutually exclusive in whole or in part. The point has been well made by Kaysen and Turner in their important recent book:

> "Antitrust policy may serve a variety of ultimate aims. We can divide the aims against which any policy proposal may be tested into four broad classes: the attainment

> of desirable economic performance by individual firms and ultimately by the economy as a whole; the achievement and maintenance of the competitive process in the market-regulated sector of the economy as an end in itself, the prescription of a standard of business conduct, a code of fair competition; and the prevention of an undue growth of big business, viewed broadly in terms of power in the society at large."[2]

We are concerned then with the body of law, primarily federal, which has to do with the maintenance and operation of a competitive economy. We are concerned with the Sherman Act and the Clayton Act, and with the Robinson-Patman Amendments to the Clayton Act. We are not concerned with the general subject of unfair competition, nor are we concerned with the so-called regulated industries, except insofar as the specific provisions or the general policy of the Sherman Act and the Clayton Act are sought to be applied to them.

At the outset, it seems desirable to mention a few of the distinctive characteristics of antitrust law which have given it a special flavor and which, in my opinion, have tended to condition its secondary

literature. To begin with, there is the generality of the governing statutes, particularly the Sherman Act. Whether that generality has produced the adaptability which Chief Justice Hughes thought he discerned[3] is doubtful. But the fact remains that antitrust law is pre-eminently a body of decisional law, through which content is given to a highly generalized set of prescriptions. In sharp contrast to other recently developed bodies of law, notably taxation and labor law, where legislative and administrative prescriptions bulk so large, antitrust is "common law." As Judge Wyzanski has said: "In the antitrust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law."[4]

A second salient characteristic is the often unrecognized diversity of goals, already commented upon, which the courts have from time to time sought to achieve through manipulation of the governing statutes. It is simple enough to assert that "antitrust is a distinctive American means of assuring the competitive economy on which our political and

social freedom under representative government in part depend."[5] But if the reference to a competitive economy is meant to state a goal, it needs further definition. And if it is intended as a description of what the courts actually have done, it is misleading.

But even if we think we know what we mean by maintaining a competitive economy, it still does not follow that we know how to achieve it, or indeed, whether given conduct or a given situation is or is not compatible with it. This brings us to another important characteristic of antitrust, which is that it involves the making of judgments for which common sense and everyday experience do not furnish infallible guides. If A & P persistently cuts price in certain retail stores, is that pro-competitive or anti-competitive? Or can we answer the question without having additional information? What additional information? A & P processes many of the foodstuffs which it sells. It also maintains facilities for purchasing produce which it sells in its retail stores. A & P is "vertically integrated." Is that good, bad, or indifferent so far as the maintenance of a competitive economy

is concerned? Or can't we answer that question without having additional facts? What facts? Economic theory may offer only a flickering light for examining these and related problems. But economic theory is ignored only at the cost of plunging oneself into complete darkness. We have, then, the necessity of reliance on a body of knowledge which places severe penalties on those who assume to know what they do not know.

Antitrust litigation involves the presentation and assessment of highly complicated factual data. Each suit creates for a time a little world all its own, in which contestants and triers of fact (as well as commentators) can and do lose their connection with the world outside. The size and complexity of individual antitrust suits militate powerfully against the coherent development of a body of law. We are often told that each case must be decided on its own facts. That may be a salutary caution against empty generalization; but it may also be a cloak for equally empty particularization.

Antitrust is, among other things, a highly

lucrative specialty which has attracted an able and articulate following at the Bar. This has come about both because of the enormous importance of antitrust litigation to the interests concerned and because of the rapidity and complexity with which the law has developed. One consequence is that research in the field of antitrust is largely practitioner-oriented. That does not mean only that a good deal of what is published consists of practitioners talking to each other about what's new -- a harmless and perhaps mutually beneficial activity; more seriously, it means that a very large proportion of the work done by scholars has tended to assume the same coloration.

Finally, antitrust is public law and political law. From the first, it has had constant political conditioning. Not a session of Congress goes by without hearings on various aspects of antitrust enforcement, on industry situations which are thought to require remedial action, and on proposals for amending the statutes. Both as repository of raw material for the research of others and as a producer of the finished product, Congress and the

antitrust agencies make themselves felt in the antitrust field.[6]

To recapitulate, antitrust is a body of common law built on statutes whose premises are neither self-evident nor self-executing and whose provisions do not neatly fit the categories of problems which are referred to them for solution. It deals with highly individualized and complex fact situations which can be ordered only through application of a theoretical construct, agreement upon which is usually lacking. The complexity of fact situations and the rapidity of the law's evolution have intended to impede orderly analysis. It affects large interests and is in all senses public and political.

In the pages that follow, we will attempt to describe and evaluate the body of scholarship about antitrust. In doing so, we will have to take constant account of the characteristics thus summarily described, for unless they are kept in mind, antitrust scholarship must seem even more formless, disorganized and chaotic than it actually is.

We have another definitional exercise to under-

take, to which we will accord the same rough treatment which we gave to the problem of defining antitrust law. This is the question of what we mean by antitrust research. It would simplify matters if we could discuss antitrust research in terms of work done by legal scholars and published in legal media. Actually neither of these limitations can be observed. Much of the most valuable and significant work in the field is either done by economists rather than lawyers, or is published in nonlegal media, or both. Indeed, one of the most striking characteristics of the state of legal research in antitrust is the extent to which the functions of analysis and criticism which legal scholars usually perform with respect to any given field of law have been taken over by economists. So, without undertaking to survey the whole field which the bibliographers of the American Economic Review classify as industrial organization, we will have to take account of what economists as well as lawyers have been up to.

A few words are probably in order about the objective and method of this paper. First, a disclaimer.

This does not purport to be an exhaustive study. I do not claim to have read every item in the literature or, indeed, to mention every item that I have read. In the course of preparing this paper, I have scanned well over a thousand items, have read rapidly several hundred, and have examined with some care perhaps fifty, either because they were very good or very bad. My purpose was to familiarize myself with enough of the literature to permit generalization about subject matter, methods of analysis, and levels of competence.

When it came to assembling bibliographies on specific subjects -- say, resale price maintenance -- I found that the work had been exhaustively done by Oppenheim in the current edition of his casebook.[7] Cross checks of a few of these lists against sources such as the Index to Legal Periodicals and the Public Affairs Index soon persuaded me that it is highly unlikely that any work of substance has escaped Oppenheim's notice. Consequently, I have relied on his bibliographies as compendia of sources on almost all specific subjects with which I have been concerned.

Another consequence is that I have not attempted to compete with Oppenheim by constructing bibliographies, except where it seemed desirable to provide a listing according to some principle other than those he employs. (The main example is the series of bibliographical notes on the work of antitrust scholars included in Section IV.) Instead, I have tried to focus on the most significant work by referring to the appropriate Oppenheim bibliography and then selecting from it for comment those items which seem particularly noteworthy for one reason or another.

I soon came to the conclusion that there is no specific subject within the realm of antitrust that has not received due attention in the literature. Indeed the more specific the subject, the more confidently that can be asserted. The gaps, as I see them, are in the organization of ideas and the construction of doctrinal syntheses. That point of view, or bias, is not one of which I was wholly innocent when I approached the task.[8] Therefore it is perhaps not surprising that I found such abundant evidence of what I may have been looking for. I mention

the point for two reasons, the first and less important of which is the principle of full disclosure. What may be more to the point is that this view of the subject accounts for what may seem the paradoxical assertion of scarcity in the midst of plenty. Much of what I have to say in the pages that follow deplores the absence of work that I think should be done. Yet there is no doubt that a superfluity of work has been done. In short, what I am complaining about here is a misallocation of resources rather than an under-utilization of them.

It would be desirable, perhaps, to reiterate at frequent intervals in this paper that a large volume of perfectly competent work has been done and is continuing to be done in the antitrust field, if only to perserve some balance and to avoid what I expect will seem an unduly querulous tone. Yet, it has seemed more important to say what is wrong than what is right with antitrust research. What is right is that not a sparrow falls but the law reviews know it. To anyone who would rather read about a complaint, an opinion, a consent decree than read it, the antitrust literature

must be seventh heaven. And the same goes for any year's output by the Supreme Court and the lower courts. Here, as perhaps nowhere else, not even the tax field, the student who is allergic to primary sources need never confront them. Whether or not that represents a triumph of scholarship is another question. It does represent a great deal of very conscientious if unimaginative hack work. And I suppose it is inevitable and doubtless desirable that the literature on any subject should be made up in the main of hack work.

Little more will be said about the vast body of hack work. In the sections that follow, we will necessarily concentrate on the non-routine, the ambitious, the imaginative. If there are deficiencies in antitrust scholarship that matter, they must be found at the top rather than the bottom of the pile. And that, in the main, is where we will look. The picture that emerges may be a distorted one, because it will contain little reflection of the truly fabulous energy that is constantly being devoted to production of trivia. The only significance that attaches to this

literature is its size. Nothing that I or anyone else can say will stem the tide. Nor is there any likelihood that the energy that is thus expended can be profitably redirected. So much, then, for ninety percent of the literature. The problem we face is somehow to capture the essence of the remaining one-tenth in a way that will permit meaningful generalizations about it.

We will start by taking a quick look at the landmarks of antitrust research from the vantage point of 1945, a kind of watershed year, marking as it does both the chronological fact of the beginnings of post-World War II economic life and the turning point in the rapid doctrinal evolution of the Sherman Act, particularly in its relation to problems of industry structure. In this survey we will do two things: we will say enough about the actual development of the law to serve as a predicate for description of pre-1945 research and to construct a framework for the more detailed discussion of post-1945 research activity in Section V. Then we will examine a few of the landmarks of pre-1945 research using as a rough

criterion: what is it indispensable for the observer in 1960 to know about what was written before 1945.

Section III considers the contribution of economics and of economists to the study of antitrust, starting with the important theoretical formulations of Chamberlin and his followers and continuing with a look at the various modes in which economists have applied their special knowledge to the solution of antitrust problems. In Sections IV and V we will examine the research activity of the period 1945-1960 from as many vantage points as can usefully be employed, not hesitating to mix ad hoc evaluation with description as we proceed. Finally, in Section VI, we will try to draw some general conclusions about the strengths and weaknesses of antitrust research, about the directions in which it seems to be heading, and about possibilities for useful work in the future.

II. PRE-1945 ANTITRUST LAW AND RESEARCH

Antitrust law as of 1945 has a highly familiar look to the observer of 1960, although many important developments lay ahead. What follows is the briefest possible description of what the law, taken as a whole, looked like in that year. This exercise may be useful in order to provide a framework for the description and appraisal of research activity which follows.

Modern antitrust law begins with the Standard Oil[1] decision of 1911, not so much because that case laid down solid decisional criteria, but because it established a general atmosphere about the interpretation of the antitrust laws which prevails to this day. One way, although not an entirely adequate one, of describing that atmosphere is to say that the decision liberated the antitrust laws from the bondage of the antecedent common law. It prescribed a policy and, within very broad limits, gave the court a blank check on which to draw in carrying out that policy. The policy, as the Attorney General's Report puts it, quoting from the opinion, is a policy against "undue limitations on competitive conditions."[2] Regardless of what Chief Justice White thought he was

doing, the effect of his misty and opaque opinion was to leave it up to the courts to decide what the Sherman Act was all about. The subsequent development has two phases, broadly speaking, which can be identified as relating to conduct on the one hand and structure on the other. Taken at a glance, the net effect of the development was to place more severe restrictions on conduct than on structure, or, in the conventional jargon of the trade, to strike more heavily at loose-knit than at close-knit combinations, although this dichotomy is inadequate since the category of conduct embraces not only collaboration among competitors, which has been severely dealt with, but also unilateral conduct on the part of firms possessing a significant degree of market power, which, on the whole has not. Similarly, "combination" is an inadequate term for describing the entire range of structural problems although it is true that most of the structural cases involved enterprises which had grown and achieved their market power in ways not limited to internal expansion.

In the area of conduct, the main line of

development lay through Trenton Potteries[3] to Socony Vacuum,[4] establishing a broad principle of hostility to collaboration among competitors tending to affect price-forming mechanisms. A counterpoint to this main line of development can be observed in cases like Chicago Board of Trade[5] and, most notably, Appalachian Coals.[6] The tension between these polar concepts--on the one hand, that interference with competitive market organization is necessarily bad, and on the other hand, that such interference may be justifiable under special circumstances--can be observed at work in the trade association cases[7] of the early 1920's and in the leading case on patent pools, the Cracking case of 1931.[8] A parallel line of development may be traced in the so-called boycott cases, which deal with collaboration among competitors tending to exclude those who are not parties to the collaboration. Here, however, the line of development much more unequivocally favored the growth of a rule of outright condemnation starting with Eastern States Retail Lumber Dealers case in 1914[9] and culminating in the Fashion Originators

Guild decision of 1941.[10] Concomitantly, problems of proving the existence of the forbidden collaboration among competitors were eased, or at any rate the possible foundation for easing them was established, by the Interstate Circuit decision.

In the zone between conduct involving collaboration among competitors and the frankly structural problems of merger and monopolization, the antitrust laws have dealt with a variety of practices unilaterally engaged in by firms possessing a significant degree of power. Since the passage of the Clayton Act, these problems have typically been dealt with in terms of an examination of the legality of a particular kind of conduct, although they all have structural overtones. It is possible to discern three principal kinds of conduct involved in these "vertical" or "unilateral" cases, all arising from the relationships between the firm and its customers or suppliers. The first type is conduct designed to restrict competition in the seller's own product, that is to say, conduct which seeks to exploit a position of monopolistic advantage, typically achieved

through product differentiation. The prototype, although not the only example, of this kind of conduct is resale price maintenance. The pattern of disapproval was set early in the Dr. Miles[12] case and much of the subsequent litigation concerned the means by which a firm wishing to restrict competition in its own products could deal with its vendees, Colgate and Beechnut[14] representing the limits set by the Court in dealing with this problem. Aside from the exception carved out in 1926 by the General Electric case[15] for price fixing clauses in patent licenses, this form of selective distribution remained under a cloud until Congress came to the rescue of the manufacturer (and of his retailers) in 1937 with the enactment of the Miller-Tydings Amendment.[16]

The other principal form of vertical conduct which came under judicial scrutiny was conduct tending to exclude competitors from dealing with the seller's customers, typically, although not exhaustively, categorized under the heading of tying contracts and exclusive dealing contracts. The tying problem first became apparent in a patent rather than antitrust

context. Indeed, it was the Supreme Court's decision in the Mimeograph[17] case, that a patentee could tie sales of unpatented supplies to the sale of his patented product, that was in large measure responsible for the enactment of Section Three of the Clayton Act. Ironically, when a few years later the Supreme Court overruled the Mimeograph case its decision was rested not on the newly enacted Clayton Act, but rather on patent law principles.[18] Indeed, for some time the treatment of tying clauses in patent cases tended to be more restrictive than their treatment in non-patent situations under Section Three of the Clayton Act, although the two lines of development eventually tended to coalesce in a virtual rule of per se illegality. The status of exclusive dealing contracts was more ambiguous. Decisions under Section Three of the Clayton Act tended to turn on whether or not the concern imposing the exclusive dealing arrangement occupied a dominant position in its industry.[19]

A third form of unilateral restraint, price discrimination, received little judicial attention during this period. Here, the principal development was

legislative. Section Two of the Clayton Act as enacted in 1914 dealt primarily with territorial price cutting, whereby a powerful seller differentiates his prices according to the competition faced in segregated markets, thereby injuring his own competitors. The problem of injury to competition among buyers was not faced until impetus from retailers in the face of the chain store movement brought about passage of the Robinson-Patman Act in 1936. The emerging conflict between the statute and the Sherman Act did not become manifest during this period.

The story of antitrust efforts in the structural field after the 1911 Standard Oil[20] and American Tobacco[21] decisions is, almost unrelievedly, one of defeat and frustration. The Steel,[22] Shoe Machinery,[23] and International Harvester[24] decisions put an effective end to attempts by the government to compel structural reorganization in basic manufacturing industries. Section One of the Sherman Act failed to prove a useful weapon against concentration through mergers, and Section Seven of the Clayton Act, passed to deal with that very problem, was emasculated by a

combination of poor draftsmanship and unsympathetic construction, and lay dormant through most of this period.

With respect to the coverage of the antitrust laws, probably the leading problem until 1945 was the status of labor activities. In the face of poorly drafted and perhaps deliberately ambiguous exculpatory formulations in the Clayton Act, the Supreme Court tended to view unsympathetically the claim of labor organizations to exemption for their activities.[25] Passage of the Norris-La Guardia Act in 1934 tended to limit the arsenal of weapons available to the courts in dealing with labor restraints. A more discriminating test for dealing with labor restraints under the Sherman Act was sought to be formulated in the Apex case in 1941.[26] However, the very next year, the decision in United States v. Hutcheson[27] provided a virtually blanket exemption for labor activities, so long as they were not carried out in collaboration with restrictive trade practices by employers.[28] The application of the antitrust laws for foreign commerce was inconsequential,

largely because of the doctrinal limitations of the Banana[29] case.

During most of the pre-1945 period, the burden of enforcement fell on equity suits brought by the Department of Justice, although during the Thurman Arnold regime a pronounced tendency to rely on criminal prosecutions became evident.[30] The Federal Trade Commission's antitrust activity during this period was largely confined to enforcing the specific prohibitions of the Clayton Act and the treble damage suit was of only marginal significance.

So much for this bird's-eye view of the development of antitrust law up to 1945. This is all preliminary to an attempt to identify the significant research effort that had gone on up until that time. Much of the pre-1945 scholarship had lost, even by that date, much of its utility except from a purely antiquarian standpoint. A great deal of learning was accumulated and expended in the search, ultimately fruitless, for the common law touchstone by which the "true" interpretation of the antitrust laws could be divined. There is more amusement value

than anything else to be extracted from observing the struggles of some of the leading legal minds of the day, such as Langdell and Gray, with the new heresies of the Sherman Act.[31] And the concluding words in Walker's history of the Sherman Act, published on the eve of the 1911 Standard Oil decision, strike a highly ironic note today:

> "The Supreme Court has no power to change that law. . . . Its construction was never difficult and will soon be quite completed by that court. Only its application to particular cases will then remain to be made."[32]

The historical approach to Sherman Act interpretation died hard. Indeed, as we shall see, it has perhaps not died at all, even yet. The work of Jones[33] and of Adler[34] are the leading examples of the effort to relate the Sherman Act to the antecedent common law. Mention should also be made of Peppin,[35] who on the very eve of Socony Vacuum attempted to demonstrate that price fixing agreements were not held unlawful per se at common law.

No legal scholar was foolhardy enough to venture a treatise on the antitrust laws. Various more or

less cursory handbooks were produced. McLaughlin, writing in 1930, found Kales to be the only purely legal treatment of the Sherman Act of any value, an appraisal which still seems justifiable.[36]

As in our own day, most of the works purporting to provide an overview of the subject were written by economists and reflected an approach centered on problems of industrial organization rather than of legal doctrine. The works of Jones[37] and Watkins[38] are perhaps the most prominent examples. The impact of the "new economics" was not much felt until late in this period. Discussion of that development is postponed to the next section.

By far the preponderance of writing about the antitrust laws then as now concerned structural problems and the adequacy of the antitrust laws, as their interpretation evolved, to deal with such problems. Some of the landmark articles are Watkins; The Change in Trust Policy;[39] Kales; Good and Bad Trusts;[40] and Handler's definitive study, Industrial Mergers and the Antitrust Laws.[41]

Much of the writing on collaboration among

competitors focused on the trade association problem; about which an enormous literature, both scholarly and propagandistic, grew up. For present purposes it is enough to mention Oliphant, Trade Associations and the Law[42] and Fly, Observations on the Antitrust Laws, Economic Theory and the Sugar Institute Decisions.[43]

Two of the most enduringly useful studies are not formally concerned with antitrust at all. One is Powell, The Nature of a Patent Right. This judicious appraisal of the Motion Picture Patents case[45] anticipates brilliantly many of the problems that eventually arose in the reconciliation of the policies underlying the patent and antitrust laws. Similarly, Chafee's Equitable Servitudes on Chattels[46] illuminated the interconnections of a wide range of vertical restrictive practices.

The literature on enforcement, although sizable, contains only a few items of lasting interest. These include Donovan and McAllister, Consent Decrees in the Enforcement of the Federal Antitrust Laws,[47] and a symposium on enforcement problems in 1940.[48]

The application of the antitrust laws to the

activities of organized labor evoked a great deal of comment in the law reviews. Particularly notable is the exchange between Cavers and Gregory at the time of the Apex case.[49]

Mention should also be made at this point of the various monographs in the TNEC study relevant to the antitrust laws. Particularly relevant are No. 16, Antitrust in Action, by Hamilton and Till; and No. 38, A Study of the Construction and Enforcement of the Federal Antitrust Laws, by Handler. These are the most useful compendia of information on doctrinal evolution and enforcement activities in the pre-1945 era.

From the beginning, economists have been close observers of the progress of decisions under the antitrust laws. Unlike their legal brethren, these students of industrial organization have not been bashful about putting forward their views between hard covers. It seems fair to observe, however, that economic study of the application of the antitrust laws to the highly diverse and complex problems of the American economy remained until a generation ago rawly empiric, lacking as it did any theoretical substructure adequate to the demands of the intended analysis. In the remarks that follow, I shall confine myself to the works of American economists.

It was not until the publication of Chamberlin's Theory of Monopolistic Competition[1] that economists were armed with a set of concepts which could be developed and applied to the evaluation of the competitive process in American industry. Chamberlin's contribution, as is well known, begins with the brilliantly simple insight that the classic models of competition and monopoly are inadequate to explain real-life market situations and that an adequate

theory requires a blend of the two. Chamberlinian theory rests on generalizations about two kinds of phenomena drawn from observation of the way markets actually behave. The first is the awareness of, and responsiveness to, the activities of rivals characteristic of markets composed of a few sellers, the phenomenon of oligopolistic interdependence.[2] The second, more heavily stressed in Chamberlin's initial presentation, is the phenomenon of product differentiation, which provides a monopoly element in competition among a comparatively large number of sellers.[3] Both aspects of the theory have had an enormous influence upon subsequent economic thought and upon the application of economic thought to antitrust problems.[4] Indeed, it is interesting to note that in a recent article by a Justice Department attorney who felt called upon to protest the injection of economic jargon into antitrust cases (presumably because better use was being made of it by the defendants than by the Government), the two "bugbears" whose use he deplored were "oligopoly" and "substitute competition."[5]

The gap between the abstractions of Chamberlinian theory and the world of antitrust is sought to be bridged by the literature on public policy aspects of industrial organization, usually under the heading of "workable competition." As a leading economist has remarked, "there are as many definitions of effective or workable competition as there are effective or working economists."[6] Since the term "workable competition" was coined by J. M. Clark[7] it has been used so many times in so many different ways[8] that it stands for no more than the particular view of its current user about the Good, the True and the Beautiful. These views cover a spectrum ranging from those who, devoted to the classical model, tend to identify desirable public policy with structural criteria, to those who see no independent value in competition and tend to evaluate markets in terms of their economic performance, with strong emphasis on progressiveness. The extremes are represented by Stigler[9] and Edwards[10] on the "structural" side and Kaplan[11] and Griffin[12] on the "performance" side. Just to add to the confusion, there are those "structuralists" like Stocking[13] and Adams[14] who identify "workable competition" with the views of the

"performance" enthusiasts and then proceed to denounce the concept as a whole. Perhaps the most judicious views, and therefore the least subject to precise classification, are those expounded by Mason,[15] who through his own writings and his influence on a number of economists of the younger generation may perhaps be regarded as the most important figure in the field. Mason's work, and that of his students such as Adelman[16] and Kaysen,[17] demonstrates an eclectic attitude toward factors of structure and performance. Indeed, any one who is rash enough to categorize the views on workable competition is confounded not only by the contrariety of views expressed by the same economists in different occasions. For example, Mason has often been cited for his emphasis on performance factors.[18] Yet he recently observed that "the demand for full investigation of the consequences of a market situation or a course of business conduct is a demand for non-enforcement of the antitrust laws,"[19] a position which seems to convey something of a rebuke to the enthusiastic disciples of performance criteria. None of this should occasion

any great dismay, except among those who profess to see in the newer economic learning some infallible touchstone for public policy.

So far, there has been very little tendency among economists to translate their policy views into specific suggestions for the guidance of the courts or, failing that, for remedial legislation. The acuteness of economists' analysis of the shortcomings of the legal process contrasts oddly with the thin quality of their constructive suggestions. Certainly, there is not much utility in the conclusion that "an industry may be adjudged workably competitive when after the structural characteristics of its market and the dynamic forces that shape them have been thoroughly examined, there is no clearly indicated change that can be effected through public policy measures that would result in greater social gains than social losses."[20] We are not told what is to be considered a social gain, what a social loss, and how a balance between them is to be struck. The challenge that economic analysis presents to

the fashioning of better legal doctrine has not been met by economists. Perhaps we should not expect it to be. The failure of legal scholarship in this respect is more serious.

The synthesis of law and economics depends on having something to synthesize. Workable competition hardly seems to be that something. Yet lawyers have rushed in where economists feared to tread and have proposed that workable competition be written into the law as an antitrust standard. The suggestion has been made by, among others, Smith[21] and Oppenheim.[22] Smith's proposals must have been what Mason had in mind when he referred to the call for evaluation of all aspects of a market situation as an invitation to non-enforcement:

> "In determining whether any commercial practices or courses of conduct promote Effective Competition or are unreasonably injurious thereto, all relevant circumstances shall be considered, including such actual or probable results of the conduct, under like circumstances in the market, as the increase or decrease of:
>
> (1) Alternatives available to customers or sellers;

(2) Volume of production or services;
(3) Quality of the services or goods;
(4) Number of people benefited;
(5) Incentives to entrepreneurs;
(6) Efficiency or economy in manufacturing or distribution;
(7) The welfare of employees;
(8) The tendency to progress in technical development;
(9) Prices to customers;
(10) Conditions favorable to the public interest in defending the country from aggression;
(11) The tendency to conserve the country's natural resources;
(12) Benefits to the public interest assuming the relief requested by the government in the proceedings."[23]

Oppenheim sums up in a characteristic metaphor:

> "This writer believes that the main bridge for connecting economic and legal concepts with realistic national antitrust policy should be built on the engineering foundation of the Rule of Reason applied through utilization of the concept of Workable Competition."[24]

To what extent this formulation calls for reliance on the range of considerations suggested by Smith is difficult to say. To the extent that it does, the same basic objection applies.

The most carefully thought out attempt to apply the new learning to antitrust reform carefully disavows

reliance on talk about workable competition.[25] Like most shorthand phrases, it is useful only when the user is aware of how little it conveys. Perhaps the debate over workable competition is now drawing to a close. I would like to think that the appearance of the Kaysen-Turner book marks the beginning of a new phase of discourse about the application of economic analysis to antitrust, a phase in which proponents of one or another viewpoint carefully explain the premises upon which they proceed and then subject their proposals to the exacting test of reduction to a legislative prescription.

The debate over public policy by no means exhausts the forms taken by economists' contributions to antitrust. There have been a number of books which contain useful reviews of recent trends in antitrust enforcement. Noteworthy among these have been works by Edwards,[26] by Stocking and Watkins[27] and by Dirlam and Kahn.[28] All of these tend to emphasize, and quite understandably so, the sectors of antitrust activity bearing the closest relation to problems of industrial organization: mergers,

integration, monopolization and oligopoly behavior. This emphasis, given the dominance of economic as opposed to legal commentary in book form, has perhaps tended to slight the less dramatic but more pervasive problems of collaboration among competitors and vertical practices by individual firms possessing some degree of market power.

Perhaps the most useful form that the contribution of economists assumes is the industry study, which has been disarmingly characterized by one of its more successful practitioners in the following terms:

> "The usual way of generalizing from a sample of one is to denominate it a 'case study' and speak of the insights into or suggestions about the problem at hand which can be drawn from it."[29]

A number of examples of this art form deserve mention. Among the older ones are Wallace's study of Alcoa[30] and Bain's study of the West Coast Petroleum Industry.[31] Both of these have a good deal to say about the relationship between structure and performance. Wallace's study provides an interesting contrast with Judge Hand's view of Alcoa as the aggressive,

expanding concern, eagerly embracing all opportunities, foreseeing and anticipating increases in demand, and thereby frustrating potential rivals. To the contrary, Wallace quite convincingly pictures Alcoa as the typical monopolist, enjoying to the hilt the quiet life.[32]

In recent years, the literature of industry studies has been considerably enriched by the publication of works dealing with industries which have been involved in antitrust litigation. Nicholls suggests that the jury's verdict of conspiracy in the American Tobacco case was an erroneous one, at least in the conventional sense of the term conspiracy, thus presenting us with an example of apparently collusive results achieved noncollusively through oligopolistic interdependence.[33] Kaysen's study of the Shoe Machinery case is, together with Wallace's study of Alcoa, a classic study of single firm monopoly.[34] It is also, because of the author's unique position as "law clerk" to the judge who tried the case, full of remarkable insights about the relationship between economic theory and the formation

of a legal judgment in antitrust litigation.[35] McKie's study of the tin can industry[36] is particularly useful because of its examination of the effects of the American Can decree, dissolving the contracts tying the use of American's closing machinery to purchase of its tin cans and limiting requirements contracts to one year. McKie's conclusion that these measures have had some liberalizing effect on competition in the tin can industry[37] is illuminating, particularly in view of the doubts which have recently been expressed about the utility of remedies curing so-called "abuses" of monopoly power without striking at the power itself. Finally, there is the culmination of Adelman's study of the A & P case,[38] in which he recapitulates and amplifies the arguments which he has previously made, fortifying them with a large display of facts, and, for me at least, thoroughly besting his opponents in what has undoubtedly been the most hard-fought polemic battle in the antitrust field.[39] Shorter industry studies are collected in three recent compendia by Adams,[40] Whitney[41] and Bain.[42]

Economists also have provided us with much

light on some of the underlying factual questions which need to be resolved in order intelligently to make antitrust policy. Most important, the question of industrial concentration, particularly in its relationship to the so-called merger movement, has been clarified.[43] Recent research has emphasized the importance of factors other than industrial organization with respect to industrial concentration, particularly the effect of taxation.[44] At the same time, we have been made much more discriminately aware of the deficiencies in the various concentration measures which have been employed, and in the great contrariety of results which can be obtained, deliberately or inadvertently, by manipulating them.[45] If all this seems to add up to the typical case of the more we know the less we know, that does not seem to be any reason for ceasing to listen to what the economists have to tell us.

Finally, there have been explorations of quite new economic concepts. Two in particular deserve mention. One is Edwards' pioneering work on the conglomerate firm,[46] a vexing problem about which

economic theory has, as yet, very little to say, yet which is becoming an increasingly important phenomenon in American industrial organization. The other is the development of game theory as a tool of analysis for understanding, in particular, the operation of oligopolistically interdependent markets.[47]

It may be appropriate to close this rapid transit survey of the contributions of a neighboring social science to the study of antitrust with the observation that economics is probably not the only one of the social sciences that potentially has something to say. Yet we have heard little from the others. An engaging exception is the political scientist Earl Latham, whose interesting work on the Cement Institute as an example of private government[48] represents an approach to problems of antitrust concern which might profitably be emulated in other applications. Perhaps the problem that I see here will be solved not by practitioners of other disciplines undertaking to examine antitrust questions but rather by economists and lawyers alike broadening their sights to take into consideration factors which their austere forebears might

have thought quite alien.[49] If the corporation really has a soul, as Mr. Berle keeps telling us, perhaps it also has a pituitary gland, the activities of which may be regulated so as to prevent giantism.

I cannot conclude without commenting that the level of discourse among economists seems to be considerably higher than that among lawyers. Perhaps this is because, on the whole, they do not confine themselves to so narrow a frame of reference as do the lawyers. Perhaps, also, it is attributable at least in part to the greater difficulty which an economists experiences in getting a paper published than does a lawyer. On the other hand, it may be that the economists have set themselves more tractable tasks than face legal scholarship.

In this and the following section I will try to describe and lay the foundation for an appraisal of the state of legal research in antitrust during the fifteen year period from 1945 to 1960. This section presents an overall picture of what has been going on by describing the activity of legal scholars from a number of different perspectives: first, a description, with examples, of the forms in which research results have been published; second, a word about methods of research; third, the media of publication and the relation between the media and the work product; fourth, a brief examination of the trend toward organized research; finally, on the theory that it is impossible to say anything about research without saying who is doing what, an identification of the leading workers in the field and a description of what they have been up to. Hopefully, all this will result in a fairly accurate if somewhat kaleidoscopic picture of what has been going on in antitrust over the past fifteen years.

The Forms. Although the distinctions drawn here are rather arbitrary, I think that on the whole it is

true that books usually represent a more sustained and ambitious kind of undertaking than do contributions to the periodical literature. However, in so categorizing the research output, I do not mean to suggest that the one is more valuable than the other. On the contrary, it may well appear when we approach the task of evaluation that on the whole the smaller forms have been the more successful.

General texts written from a legal standpoint have been rare. There is no major treatise. An alternative statement of the same proposition is that there has been one effort to construct a major treatise but that it has no merit whatever. In lieu of a detailed and necessarily painful appraisal of Mr. Toulmin's seven volume scrapbook,[1] I shall simply associate myself with the judgment implicit in the absence of any citation to Toulmin in the Oppenheim casebook which, as I have previously mentioned, contains the most comprehensive bibliographies on the subject.

More modest efforts of general scope take the form of handbooks designed to introduce the general practitioner to the intricacies of the subject. Van

Cise is the author of one such effort in the useful series published by the Practising Law Institute.[2] The ABA's Section of Antitrust Law has published An Antitrust Handbook,[3] which has brief papers by various hands on aspects of the subject. And there is a collection of useful papers in the N.Y. State Bar Association's How to Comply With The Antitrust Laws.[4] Modern American Antitrust Law by Kronstein, Miller and Schwartz[5] is a combined text and casebook which is not a particularly outstanding example of either. Loevinger's The Law of Free Enterprise[6] is a breezily written explanation of the antitrust laws designed for reading by laymen. The leading casebooks are Oppenheim's, Handler's, and Schwartz's. Their virtues and defects are chronicled at some length in Appendix I to this study.

Most of the books which attempt to survey something less than the field as a whole concern themselves with those aspects of the problem dealing with market power. These include Hale and Hale, Market Power: Size and Shape Under the Sherman Act,[7] and the several books on antitrust policy by economists

described in the preceding section. Finally, there is the unique recent study by Kaysen and Turner which, although primarily concerned with the central problem of market power, touches in an illuminating way on almost all the important issues in the antitrust field.[8]

Special mention should be made of books dealing with antitrust in foreign trade. Because doing business aborad runs almost the entire gamut of antitrust problems, these studies are significant not only for their specific content but also for what they have to say about antitrust as a whole. Two such studies appeared in 1958.[9] Of them, the volume by Brewster is by far the more important.

The Robinson-Patman Act has received extended treatment in the concise and lucid introduction to its vexing problems written by Austin for the American Law Institute.[10] A more detailed study of the same subject is being prepared for the Trade Regulation Series by Rowe, who has been publishing a series of articles on various aspects of Robinson-Patman over the last few years.[11] Corwin Edwards' monumental The Price Discrimination Law has already been mentioned.

There are a few attempts at general synthesis in less than full book length form. Two will be discussed in detail at a later point. One is Oppenheim's 1952 article;[12] the other is Rostow's chapter on antitrust in his recent book Planning for Freedom.[13]

That characteristic law review specimen, the case study, is heavily resorted to. The antitrust field is particularly conducive to this form because there are so many important cases and because each case usually contains enough within it to serve as a useful point of departure for extended analysis. The overwhelming majority of such studies (which make up the bulk of student work as well as a good deal of the output of older if not necessarily wiser heads) have at best an ephemeral utility. But occasionally an author uses a current decision as the springboard for a highly penetrating examination of a broad problem and thereby makes a substantial original contribution. Examples include Rahl's article on the Schwegmann case;[14] which illuminates the relationship between federal antitrust law and state regulatory policy; Neal's study of the Transamerica case;[15] which

contains a prescient analysis of the difficulties contained in the delusively simple test of illegality prescribed by Section 7 of the Clayton Act; and Turner's article on the Cellophane case,[16] a notable although apparently unsuccessful effort to undo some of the damage caused by the Supreme Court's quick gulp at the Pierian spring of substitute competition.

There are many analyses of lines of decision which embody the traditional legal attempt to generalize from the concrete and to construct predictive and normative hypotheses. I shall have more to say about some of these when we come, in the next section, to consider the work done on various substantive problems. I will say no more at this point than that this traditional mode of legal analysis has been rather less successful in the antitrust field than it has been elsewhere.

Several legal scholars have undertaken factual industry studies, particularly those sparked by the AALS attempt in 1950 to provide economic background materials for the study of trade regulation.[17] These have been comparatively less important in the output

of legal scholars than in the work of their economist brethren.

A more popular form is the survey of current developments. Its most consistent practitioners are Derenberg,[18] Handler,[19] Oppenheim[20] and Sunderland.[21] These surveys are rarely profound or original but they do serve as a handy means for keeping abreast of the field and at their best, are reasonably reliable barometric indicators of changes in trend.

It is impossible to construct any useful generalization about the enormous mass of student material in the law reviews, except to note its depressing volume. In its most typical form, the comment on a recent case, it is vastly overdone. And, of course, it has a high rate of obsolescence. Occasionally, student work is very valuable, either because the anonymous author brings extraordinary powers to bear on his subject,[22] or because he has done an exceptionally conscientious job of ferreting out and putting together materials that no one else has had enough Sitzfleisch to do.[23] As is not surprising, the best student work seems to come from some of the schools where strong teaching

and scholarship in antitrust is being carried on, such as Yale,[24] Chicago,[25] Pennsylvania,[26] Columbia[27] and, recently, Harvard.[28]

Finally, there is the book review. Often it serves as the vehicle for penetrating comment on the work of others and, more important, for tentative development of an idea by the reviewer. My unsystematic perusal has not turned up any absolute masterpieces, but a few choice examples are listed in the margin.[29] The reasons for excellence in the book review are not hard to discern: the author is unhampered by any expository obligation, he need not be systematic, he can indulge to the fullest his destructive propensities (in which lawyers are not notably deficient), and he can sprint rather than run a distance race.

Methods of Research. By far the greatest bulk of the work in the antitrust field is carried on through the conventional process of analyzing the reported opinions of courts and commissions. This is supplemented, ordinarily, by consideration of the briefs of the parties. Indeed, it seems safe to say that no conscientious scholar undertakes to

analyze an opinion in detail without seeing the arguments of counsel. Less regularly, but still frequently, scholars use the records of trials. The record of a major antitrust case may serve as the raw material for an industry study, and several have been so used.[30] And the secondary literature, both legal and economic, is heavily resorted to. Indeed, there exists a kind of standard footnote which can easily be moved from one article to another without loss (or gain) in relevance, whose primary function seems to be to demonstrate that the author has read everything that he should, not just about the immediate problem at hand, but about the law and economics of antitrust in general.

Field research techniques, such as interviews with knowledgeable persons in affected industries, have not been used very often or very systematically, although a trend in this direction is discernible.[31] Since TNEC, there have been few macrocosmic studies of enforcement.[32] And aside from rather casual ventures into print, often of a mainly anecdotal nature, by practitioners with antitrust experience, there

has been no effort to cull the wealth of material that resides in lawyers' files. As a consequence, we know almost nothing about the effects of antitrust law on industry practices except what turns up in the litigation context.

Media. Antitrust shares with other fields in law the existence of a sellers' market for publication. The proliferation of law reviews makes it easy to get anything, no matter how trivial, into print. And, since antitrust tends to be something of a "glamor" course in many of the leading law schools, student editorial judgment seems to favor a sizeable dose of both signed articles and anonymous student work in this currently fashionable specialty.[33] Indeed, it is an understatement to speak of the ease with which contributions get published. It would be more accurate to speak of the desperation with which the editors of the various reviews try to fill up the requisite number of pages with minimally acceptable material. The sellers' market is enhanced by the existence of a number of publications (all of recent origin) dedicated exclusively to antitrust.[34] To a large extent,

these publications serve as repositories for papers presented at symposia on antitrust problems, which have become fixtures for several bar associations. Whether these symposia contribute as much to the sum of human knowledge as they do to the sum of human happiness is doubtful. It is certain that their increasingly institutionalized existence puts pressure to produce (never mind what, just produce) on scholars and practitioners alike. To the extent that this provides tax-deductible conviviality, it is to be commended. To the extent that it deflected the time and energies of people who might be better occupied, it is to be deplored.

Organized Research. Under this heading, we will consider some of the major continuities in antitrust research, going beyond mere ad hoc collaboration on a book or article. The most conspicuous example during the period under review is the Report of the Attorney General's National Committee to Study the Antitrust Laws.[35] I will have something to say about its merits in the next section. At this point I want merely to emphasize its importance as a public event. It generated a vast subsidiary literature which happens to

include some of the outstanding work in the field during this period.[36] And it served as a means for generating thought about problems far beyond the ambit of what the Report itself tried to deal with. On the whole, I think that this exercise in introspection by committee had greater importance for the ferment in thought about antitrust for which it served as both symbol and stimulus than for the substantive results which it achieved.

Of a very different order are two projects which have been underway at two leading universities. The Merrill Foundation sponsored a study at Harvard of competition and monopoly in American industry, under the direction of Dean Edward S. Mason. In one aspect, the project involved the publication of seven books: five industry studies, Bain's important study of entry conditions in twenty industries, and Kaysen and Turner's Antitrust Policy.[37] This last book stemmed from the project's other aspect, a continuing seminar of lawyers and economists who met together regularly over a period of seven years.[38] While the Kaysen-Turner book does not represent the collective judgment

of the seminar's participants, it clearly benefited from the discussion. And, as we can gather from hints dropped in work not formally a part of the project,[39] the seminar had had a profound effect on the thinking of those who from time to time participated in it, without at all compromising their independence of attitude.

The antitrust project at Chicago is a somewhat more nebulous affair. I am informed that there has not been an organized group research project in antitrust, but rather a continuing opportunity for lawyers and economists to spend some time at Chicago and to work on items of their choice in the general field.[40] However, there does appear in the work done a common approach which, one gathers, derives importantly from the views of Professor Aaron Director who, together with Dean Levi, teaches antitrust at Chicago. If there is a "Chicago school" of antitrust thought, its manifesto is presumably the article by Levi and Director on Trade Regulation in the Northwestern Symposium on Law and the Future.[41] Its principal feature appears to be skepticism about the "extension"

of monopoly power through "abuses" such as tying arrangements and price discrimination, and a concomitant disdain for remedial measures addressed solely to the existence of such practices.

Both the Harvard and the Chicago projects brought lawyers and economists together in a setting which made possible a continuing and mutually helpful exchange of ideas. The output of the participants in both projects bulks large in my subjective compendium of first-rate antitrust work contained in Appendix II.

Organized research in the field of the legal monopolies is represented by the work of the Patent, Trademark and Copyright Foundation of George Washington University and is published in the Foundation's house organ, which bears the resounding title of the Patent, Trademark, and Copyright Journal of Research and Education. While the Foundation appears to have a rather strong industry orientation it is sponsoring some useful research, including a series of follow-up studies of the effect of compulsory licensing provisions in antitrust decrees.[42]

People. Another way of looking at the field is

to identify the people who have been carrying the brunt of scholarly work and examining what they have been up to. I have already identified the principal economists and their contributions. I will here attempt the rather more ticklish job of describing and commenting on the work of my fellow-lawyers, both in the schools and at the bar. The selection is of course based on a wholly subjective appraisal, although I believe that no one who has more than five antitrust entries to his credit in the Index to Legal Periodicals has been omitted.

First, the academicians. The older generation includes two pre-eminent figures: Milton Handler[43] and S. Chesterfield Oppenheim.[44] Handler's principal scholarly work was accomplished in the era before 1945 and has already been commented on. Since that time, he has twice revised his casebook (1951 and 1960) and delivered on numerous occasions, as befits his position as an elder statesman, his observations on current developments in antitrust. He has been in the forefront of sloganeering controversies about such matters as "conscious parallelism" and "quantitative substantiality."

His one contribution to a synthesis of antitrust law was regarded by some as disappointing.

Oppenheim is the other principal figure in the older generation of antitrust scholars. He is the author of the most widely used casebook, the co-chairman of the Attorney General's Committee, and the Section Delegate of the American Bar Association's Section on Antitrust Law. No symposium on antitrust is complete without his presence or Mr. Handler's. His major attempt at synthesis, a long article in the Michigan Law Review, has considerable historical significance, since it apparently had much to do with the creation of the Attorney General's Committee. As doctrinal exegesis it is less than satisfactory, for reasons to which I shall refer in the next section. His role as a dedicated and disinterested scholar remains pre-eminent.

In the next generation (roughly, men between forty-five and sixty) two of the most brilliant scholars have been Edward H. Levi and Eugene V. Rostow. Unfortunately, the scholarly productivity of both has been somewhat curtailed by the demands of decanal

responsibility. Levi[45] and Rostow[46] both made notable contributions in 1947 with comments on the changed views toward monopoly power evidences by the Alcoa and American Tobacco cases. Rostow's work on that subject was later incorporated into his controversial book on the oil industry, a subject to which he later returned in a major article. His service on the Attorney General's Committee left strong marks on the Committee's Report, as is evident to anyone familiar with his views. Most recently, he has given us a graceful and penetrating recapitulation of his views on antitrust. And there has been the usual scattering of more occasional pieces. Levi has not published any extended work in the antitrust field since his 1947 article, although his shorter pieces, particularly a talk on the Robinson-Patman Act, and his glimpse at the antitrust law of the future (with Director), have always been thought-provoking.

Among other members of the same generation, Louis B. Schwartz[47] seems to me pre-eminent. He is the author of the most creatively original casebook in the field, as well as of a number of useful articles.

He will probably go down in history, however, as the author of the Schwartz Dissent from the Report of the Attorney General's Committee. Others in the same generation include Kenneth Carlston,[48] whose interest has been primarily in the foreign policy and general jurisprudential aspects of antitrust, and Carl Fulda,[49] who has done much useful work on antitrust and regulated industries.

The younger generation has also suffered a loss to administration in the departure of Kingman Brewster, whose book on antitrust in foreign trade is one of the best works of the last fifteen years.[50] Among those who are left, the leading figures seem to me to be Rahl[51] and Turner.[52] Rahl has written a number of articles which are characterized by closer analysis than is typical of most writing in the antitrust field. Rahl never forgets that he is a lawyer and that what is involved in antitrust is, among other things, a body of law. Turner, who combines the skills of law and economics, has used the art form of the case study as a basis for very fruitful generalizing about market definition and tying arrangements. His most important

work so far, however, is the book on antitrust policy which he and the economist Carl Kaysen recently published.

Among the practitioners, Gilbert H. Montague[53] occupied, until his recent death, the unique position of having been a commentator on antitrust problems since before the 1911 Standard Oil decision. McAllister[54] has done much useful work, particularly on problems of procedure and enforcement. Austin[55] and Rowe[56] have been pre-eminent among commentators on Robinson-Patman problems. Wood[57] is the most articulate defender of the patent system against the onslaughts of antitrust. And Austern's[58] witty acerbities are in a class by themselves.

Although antitrust practitioners are an extraordinary prolific lot, their contribution to scholarship, for reasons that are obvious, have not been qualitatively significant. As for the academicians, there has been no lack of industry, as their bibliographical footnotes demonstrate. But as those footnotes also demonstrate, there has been a diffusion of effort, a response to the demands of the here-

and-now, a lack of coherence and progression that symbolize, as they represent, a failure that is the product of too much success.

We turn now to an examination of the substantive problems that have been the concern of antitrust scholarship in the last fifteen years, beginning with the few attempts that have been made to view the field as a whole.

The Overviews. In 1952 and 1953 the American Law Institute investigated the possibility of undertaking a project in the antitrust field. An advisory group under the direction of Professor Robert R. Bowie of Harvard considered the problem and rendered a report, the substance of which was approved by the Council of the Institute.[1] The report took the position that:

> ". . . a serious need exists for a thorough analytical treatment of antitrust law, taking account of the statutes, decisions, administrative actions, and other related materials.
>
> At present there is no such systematic treatment of this body of law which the Advisory Group of Council considered satisfactory."[2]

This need, if it is a need, has still not been met. The reason why it has not is that no one has developed a conceptual framework equal to the task of synthesizing the large and unruly body of antitrust law so as to

provide criteria for critical analysis of the statutes and decisions.

The major attempt at an overview of the subject in the last fifteen years was the Report of the Attorney General's Committee.[3] The Report is a very useful document. There is no better general introduction to the antitrust laws. It does not, however, provide the conceptual framework for lack of which critical analysis of antitrust has suffered. Superficially, this central deficiency in the Report appears to stem from what we may call its political character: it suffers in large measure from "the vacuity characteristic of desperately negotiated documents."[4] In the attempt to harmonize the disparate views of sixty-odd highly opinionated people, what inevitably emerged was a sort of lowest common denominator. But the real explanation for the Report's failure is a somewhat subtler one, which might have still prevailed even if it had been the work of a single hand. The Report treats the governing substantive statutes as given and thus fails to come to grips in any candid way with their deficiencies. The only exception is the

easy excoriation of the Fair Trade exemption, and even that does no more than repeat the prevailing cliches without placing the Fair Trade problem in the broader context of selective distribution techniques. For the rest, even for Robinson-Patman, better "interpretation" is all the Report asks. The other provisions of the Clayton Act, and the Sherman Act, are treated as Holy Writ. And this lack of basic critical inquiry is compounded by the attribution of an often spurious consistency to the "main line" of Sherman Act decisions.[5] While the Report rendered a distinct public service in resisting the then-fashionable plea for antitrust revision to conform with the vague dictates of Workable Competition, it did so at the cost of adopting a tone of optimism that precluded effective criticism. In so doing, the Report failed to break new ground in constructing any kind of meaningful analytical framework for evaluating the body of antitrust law.

Few individual scholars have attempted the job which the Attorney General's Committee failed to do. There have been only a handful of attempts to provide an overview. None of them has been particularly

successful, primarily because of their failure to develop a framework for analysis, but a few deserve mention.

First, there is the Oppenheim article,[6] which had much to do with the creation of the Attorney General's Committee. This article attempted to equate desirable antitrust policy with the newer learning in economics through identification of the concept of workable competition with the rule of reason. I have already commented on the difficulties of using so elusive a concept as a guide to policy formation, but the point can be further illustrated by reference to Oppenheim's views. He says:

> ". . . the identification of any economic evaluation as a Rule of Reason approach necessarily depends upon whether there is genuine willingness to consider all of the relevant economic factors bearing upon the interaction of structure, behavior, and accomplishments in the particular case."[7]

I think it is fair to say that this standard provides little guidance in determining what the components of an antitrust violation are and what defenses, if any, are admissible to rebut a prima facie case.

This fatal vagueness is perfectly illustrated by a later attempt of the same author to clarify his meaning:

> "If any ambiguity was found therein [the above-quoted article], this writer here takes occasion again to state his view that behavior and accomplishments of an industry or firm may be considered relevant evidence in determining whether an antitrust violation exists but good behavior and accomplishments should not be a defense to, or justification for, an antitrust violation established by the entire record evidence."[8]

Oppenheim also addressed himself in this omnibus article to the standards of legality for restrictive agreements among competitors. Here he called for an abandonment of per se rules and substitution for them of a prima facie case of illegality. The surprising suggestion is made that per se rules are unconstitutional because they cut off defenses that might otherwise be asserted, thereby depriving the defendant of its "constitutional right to a fair and full hearing on questions of fact on discordant issues of antitrust policy."[9] This deficiency, Oppenheim says, can be remedied by allocation of the burden of proof, permitting the defendant to justify its restrictive conduct.

We are not told what justifications are to be admitted, other than that the defendant may show "all the relevant facts,"[10] or "justification within the allowable limits of the antitrust statutory standards,"[11] or "the panoply of possible legal and economic justifications in harmony with an overriding public interest of which the antitrust laws may properly take cognizance."[12] To my eye, this appears to be the kind of "invitation to non-enforcement" against which Dean Mason has warned. Alternatively, it falls into the vice of vagueness.

While there are formidable difficulties inherent in his approach, that does not detract from the value of what Oppenheim was attempting in this article. A reappraisal of antitrust policies is perhaps the most important contribution that disinterested scholarship can make. The fact that Oppenheim's effort was largely an unsuccessful one does not mean that others ought not to make the attempt.

Handler's Antitrust in Perspective[13] similarly fails to do its author's reputation full credit. I will not repeat what I have said about this book

elsewhere;[14] an additional thought that derives from this study is that the book typifies the unease that seems to overcome antitrust experts when they try to expand their view beyond the current Supreme Court advance sheets.

A different order of criticism is required for Rostow's recent summing up.[15] His approach represents a high plane of sophistication and an organizing view of the field. His grasp of the economics of competition is sure and his reading of the cases combines precision with insight. Why, then, is one left with a sense of disappointment after reading his summary of antitrust law, a sense of problems glossed over, of solutions too facilely advanced? I submit that this impression results from Rostow's enormous optimism about two things: the flexibility of the Sherman Act and the capacity of enforcers and judges to use this asserted flexibility wisely. Leaving aside his view of the Standard Oil case as the source of all wisdom -- a view which his persuasive powers apparently caused to be adopted by the Attorney General's Committee -- Rostow's antitrust law rests on the notion

that the Sherman Act is equal to all demands that may be made of it. More than a decade ago, he saw evidence of that flexibility in a group of decisions, to which he gave the name "The New Sherman Act,"[16] which seemed to suggest that the statutory framework was equal to the job of coping with oligopoly problems. In particular, he found in the American Tobacco case the concept of "collective monopoly" which would lead from the economic identification of interdependent action in a market of a few sellers to a legal conclusion of conspiracy to monopolize. In his most recent synthesis Rostow appears pretty much to have given up on that tack, and is now suggesting the view that the market power of a single large firm may be challenged by treating it as a "combination" under Section 1 of the Sherman Act. The notion seems to be that any firm which has grown by means other than internal expansion, however ancient its mergers may have been and however innocuous when consummated, remains forever vulnerable. "The mark of Cain is upon it."[17] This test of legality is apparently designed to do the same job as the "collective monopoly" technique, but

to do it in a "simpler and more discriminating"[18] way. I am inclined to doubt that it is either simpler or more discriminating, particularly the latter. Consider an industry dominated by two large firms. Firm A has grown by merger. Firm B has grown entirely by internal expansion. Under the Rostow theory, Firm A is vulnerable to a Section 1 charge and may be dissolved as a consequence (into its original constituents or into an economically meaningful group of firms? and if the latter, on this theory, why?). Firm B, whose market power may be as great as that of Firm A, is immune. If there was one overriding virtue to the "collective monopoly" approach it was that it permitted an industry to be dealt with as a whole, a virtue that would be lost under this "simpler and more discriminating" test. In short, I doubt that "combination" is any more talismanic a word than "conspiracy" and I doubt further that either will suffice to refurbish the Sherman Act as a device for dealing with the central problem that confronts a rational law of industrial organization, in which that law is now outstandingly deficient.

"The principal defect of present antitrust law is its inability to cope with market power created by jointly acting oligopolists."[19] That is the conclusion of Kaysen and Turner, whose book is the most recent attempt at a general synthesis participated in by a legal scholar. Joint profit maximization without overt collusion is the problem, as they see it. I agree with the authors that the solution, if there is to be one, must come through new legislation rather than through manipulation of Sherman Act terminology. The fact that I agree with their approach undoubtedly conditions my view of their book, which is that it is the single most valuable piece of work which has been done in the antitrust field in the last fifteen years. It is so, I think, not only because of the impressive qualities of knowledge and ability possessed by its authors but also because of the merits of the approach they have adopted. Instead of playing games with the language of the existing statutes, they have adopted a legislative approach. The merits of such an approach have been classically described by Herbert Wechsler:

> ". . . we [should] concern ourselves with our subject as we think

> it should be viewed by those with ultimate responsibility for making law, not merely the subordinate responsibility for its interpretation or its application. . . .
>
> "A shift of this kind in our focus or prespective works enormous change in our preoccupations. For our interest moves at once from the peripheral issues that give the largest trouble to the courts, working within existint systems, to the basic and intrinsic problems of the field, the questions as to ends and means that ought to be confronted in the building or appraisal or improvement of a system geared to serve its proper functions in the government of men. The target necessarily becomes to order all the problems in their right relation to each other; to explore their proper solutions, estimating in so far as possible both their advantages and cost; to marshal, articulate, and weigh the values, knowledge, judgment, and experience that bear upon the choices to be made."[20]

I am persuaded of the validity of this approach in the present posture of antitrust research. Its validity does not of course depend on whether particular statutory formulations manage to survive the ordeal of the legislative process. For the purposes of scholarship, its value lies in the liberating perspective that it provides. To the extent that problems of maintaining

a competitive economy can be divorced from the framework of a particular set of statutory prescriptions, it should be possible to deal with them in a fresh and imaginative way.

That is what Kaysen and Turner have done with the problem of "unreasonable market power," and the range of solutions they explore should be of great assistance to all who work in the field. Perhaps the clearest indication of the value of the legislative approach is that their book is strongest where they use it in a radical and thoroughgoing way, and weakest where they accept without much examination the prescriptions of existing law. Their treatment of collaboration among competitors, for example, seems to me to suffer from too ready an acceptance of the per se rule of reason dichotomy and too ready a willingness to cast solutions into existing statutory molds. A careful review of their book, which these remarks are not, would have to point out the several respects in which, for the sake of completeness of coverage, they have given only cursory attention to problems that require extended treatment. But even with these shortcomings, their

achievement is a unique one. They have surveyed the entire range of problems with which antitrust law is or ought to be concerned and they have managed to say something meaningful about all of them. Furthermore, in a field that is so laden with value choices they have been candidly aware of their own premises and have not concealed them in a mystifying cloud of words. This quality of candor is one of the great merits of their work, freeing a judgment of its utility from the degree of an individual reader's agreement. It would be equally valuable for proponents of other points of view to state their premises with equal candor and then to discuss the available modes of solution in equal detail. It is probably illusory to expect so much, but it would be heartening to suppose that the appearance of their book presages an era of discourse on a level equally as high as the one they have achieved.

The literature, as this brief review suggests, has not been notable for either the quantity or the quality of its general syntheses. The quantitative deficiency suggests that energies which might have been devoted to this end have been finding other outlets. Probable

reasons are not hard to find. The few examples of generalization in the field have not been such as to dissipate the suspicion that any generalizations about an area so complex as this one are bound to be vacuous. Particularly in the areas of the nonstructural problems, about which we will have more to say shortly, there seems to be a strong tendency to fall back on the every-tub-on-its-own-bottom thesis that there just isn't anything very useful that can be said in an organizing kind of way about the problems in the field. Then, there is the magnetic pull of the statutes and the decisions, which forces discussion into existing channels and discourages the kind of innovating inquiry of which the Kaysen-Turner book is such a rare example. There is also the multiplicity of short-run demands on legal scholars, whose existence can readily be documented by referring to the bibliographies of the leading figures in the field.[21] There is no doubt where the line of least resistance lies, and there is no doubt that most scholars, most of the time, have followed it.

Collaboration Among Competitors. Under this heading we will consider research about activities by

parties on the same plane of competition who are unable individually to diminish competition but who may do so by engaging in a variety of joint activities.

The ephemeral quality of antitrust research is nowhere better illustrated than in this field. It has been one of the relative quiescence, so far as new problems are concerned, in the last fifteen years. The received doctrine was pretty well established by 1945. One might have thought that the opportunity was at hand for a Wordsworthian exercise of emotion recollected in tranquillity. But not so. With the conspicuous exception of an omnibus article by Hale in 1949,[22] consideration of problems in the field has been limited to the relatively marginal new developments that have occurred. Worse yet, there have been few attempts even to relate these developments to the pre-existing body of doctrine.

The great lack has been the absence of any attempt to view the problem as a whole and to construct a conceptual framework adequate to the understanding of the relationship of the various parts to the whole. We get literature ad nauseam about trade association

practices, about multilateral patent practices, about price-fixing agreements, about concerted refusals to deal. But all of these fragmentations, however useful they may be, do the positive disservice of obscuring the relationship among these various forms of collaboration. Even Hale, who has attempted the only real overview of the field, offers not a synthesis but rather a useful compendium which describes the bounds of the litigated problems and identifies the major sectors of interest. By way of summation, he is unable to produce anything more useful than the truism that "an effect on prices is the touchstone in determining the legality of activities of groups of competitors."[23]

This formulation overlooks, of course, the fact that all forms of collaboration among competitors, however superficially innocuous, may have some effect on price, since they all involve some departure from the model of perfect competition. A recognition that this is so demonstrates the emptiness of the Socony-Vacuum dictum about the illegality of price-affecting activities.[24] The task for legal scholarship is to

articulate and make explicit the criteria which should serve to determine how judgments are to be made about the manifold arrangements among competitors which may come under scrutiny. So far we have not got much beyond a sterile debate about per se vs. the rule of reason. "Per se" is meaningless unless the forbidden conduct is adequately defined. "Rule of reason" is equally meaningless, unless the criteria of judgment are spelled out. The "definite factual showing of illegality"[25] which commentators are so fond of quoting is at best a statement of the problem. To advance it as a touchstone of decision is fatuous, but that does not prevent it from being done. Surely the kind of simplistic reconciliation of the decisions which is set down in the Attorney General's Report is not what we need.

The per se dogma came in for some careful scrutiny in a valuable student note in the Chicago Law Review,[26] following the Supreme Court's Kiefer-Stewart[27] decision. However, neither this nor any other writing on the subject of which I am aware has considered the difficulties of determining what the content of the

price-fixing rule ought to be, although I believe that the material exists upon which a more refined analysis than that suggested by Justice Douglas's sweeping dicta in Socony Vacuum might be based. One recent article, by Robert Bork,[28] has revived the concept of ancillarity and, in the context of the National Football League[29] case, has suggested that it may be useful in appraising the legality of "joint ventures" which might otherwise fall within the ban of the per se rule. The same point was involved in the Investment Bankers[30] case but it hardly received careful treatment in the exchange of incivilities between Mr. Whitney and Professor Steffen on that subject.[31] The important and far reaching question involved is what kinds of effect on price will be permitted under what circumstances even though they result from collaborative conduct among "competitors." That question is not answered, nor is its consideration much advanced, by facile dogmatizing about the per se illegality of price fixing.[32]

The consideration of concerted refusals to deal, a closely related per se rule, has likewise been disappointing.[33] Little notice has been given to possible

limitations on the per se rule with respect to boycotts. The most suggestive analysis of the problem is contained in Rahl's brief comment on the Klor's decision,[34] pointing out that there are many situations in which it is far from clear that a per se rule on boycotts has anything to do with furthering the goals of a competitive economy. Legal writing on the subject has suffered, it seems to me, from a deficiency of imagination. Writers have tended to confine their attention to the spectrum of instances provided by the litigated cases. In doing so, they have ignored the instances which lie outside that narrow band of the spectrum. Perhaps I ought not to call it a narrow band. The problem is that we do not know whether it is broad or narrow and we cannot know this if we confine analysis to the litigated cases. Three general categories come to mind: one is the case where a number of economically weak parties combine to resist the growth of market power by a strong party. What, for example, would Mr. Justice Black say about an agreement by a group of competitors not to accept from a dominant firm in their industry a patent license

the terms of which would enable that firm effectively to regiment the price structure of the industry? The second kind of case is the economically irrelevant boycott. Here the dominant purpose of the boycotters is non-economic, although the result of their conduct may be interference with the competitive process. Examples are boycotts by church groups of movies thought to be unsuitable for public view and boycotts by Negroes in aid of their struggle for civil rights. Should these be violations of the Sherman Act? Finally, there is the category of joint venture boycotts -- refusals by collaborators to deal with parties outside the venture. The decree in the Associated Press[35] case is a good example of a permissible concerted refusal to deal with outsiders (assuming reasonable membership conditions), although the case is usually cited for the proposition that boycotts are per se illegal. In criticizing the overly facile acceptance of the per se dogmas with respect to price fixing and boycotts, I do not wish to be understood as embracing the opposite, equally self-defeating, assertion that every case has to stand on its own facts and it is all just

a question of whether the restraint is reasonable. Neither of these extremes is very profitable.

The literature on collaboration among competitors contains a disproportionate amount of attention to the problem of proof epitomized in the catch-phrase "conscious parallelism." It would be easier to accept these outpourings if they contributed anything very useful to consideration of the problem. Someone has called antitrust a "jurisprudence of metaphor." It might better be said that it is a jurisprudence of slogans. The debate about conscious parallelism is a conspicuous example.

Rostow's famous article in 1947[36] made the point that oligopolistic interdependence equals conspiracy to monopolize under Section 2 of the Sherman Act. That theory has not been so much repudiated as ignored in the context to which Rostow referred. We have had no industry-wide Section 2 cases resting on economic data from which an inference of oligopolistic interdependence could be drawn and seeking structural reorganization adequate to eliminate the conditions of interdependence. Instead, the theory has been

advanced, unsuccessfully on the whole, in what are essentially Section 1 situations, where an inference of concerted action is sought to be drawn on the basis of a particular incident.[37] This shift in emphasis has gone unnoticed in the literature.

The crucial question is whether a trier of fact will be permitted to draw an inference of conspiracy from evidence of consciously parallel action alone. The question has never been answered by the Supreme Court, although the Court has been presented with at least one case squarely raising it.[38] If the question is whether an inference will be permitted, it is not much help to learn that it will not be compelled. Yet, there have been cries of joy about the demise of conscious parallelism based on a wholly insignificant Supreme Court decision which held only that such an inference would not be compelled, i.e., that a verdict for defendant would not be reversed where the trier of fact had refused to find conspiracy from evidence of parallel action.[39] The extraordinarily sloppy reading of the cases[40] that has magnified the importance of Theatre Enterprises is unhappily typical

of the vulnerability of antitrust scholarship to sloganeering. In any event, the theory remains untested in the one situation where it has real meaning, where relief is sought which would end the conditions making consciously parallel action possible.

Vertical Restraints. We have next to consider the highly miscellaneous category of vertical restraints. The grab bag character of the literature about this set of problems is a consequence, in my view, of the limited imagination of legal commentators, who have been content to stay within the bounds marked out by the structure of the statutes and by the cases. What we are concerned with here, in distinction to the problems of collaboration among competitors, is a series of problems which are at root structural, that is to say, which derive from market imperfections of one sort or another, but which manifest themselves for antitrust purposes in the conduct by which the market power of the firm involved is used or enhanced. Unless we are prepared to atomize all industry structures which deviate from the competitive model, it is necessary to construct some basis for dealing with these structural

problems in terms of the kinds of behavior which demonstrate their existence. This is the exasperatingly elusive problem which underlies the entire area of exclusive dealing arrangements, of tying contracts, of selective distribution, and of price discrimination. To the extent that we are not willing to reorganize the industries concerned, the unifying question here must be: How do we go about regulating conduct so as to produce a more nearly competitive market operation? That question, complex in itself, is further complicated by inadequacies in the governing statutes and by the competing coexistence of other public policy goals, notably the desire to insure equity or fairness in business dealing to the ultimate advantage of the smaller business units, a desire which, as we know from our twenty-five years of experience with the Robinson-Patman Act, creates tensions with the goal of promoting the competitive process.

Perhaps the question should first be asked whether there is any use in trying to correct structural distortions through the regulation of conduct. That, it seems to me, is the question posed by Levi and Director

in their challenging article on Trade Regulation in the Northwestern Symposium on Law and the Future.[41] If I correctly understand what they are saying, they are dubious of the utility of any effort to control the particular forms of conduct by which market power may make itself felt. A good deal of antitrust law, such as Section Three of the Clayton Act, is based on an opposing premise. This point surely needs more examination than it has so far received.

The relationship among the various devices interdicted in varying degrees by the Sherman and Clayton Acts has rarely been commented on. There is, for example, a close connection between tying arrangements and price discrimination, a connection which becomes obvious when one begins to consider what kind of remedy ought to be applied in order to dissipate the effect of an illegal tying arrangement. When this question is presented, it becomes apparent that price discrimination is a means of securing the same advantage as the tying arrangement.

From what I have said so far, it will be apparent that I have some difficulty in talking about the

literature of any of these compartmentalized segments of antitrust law, since I consider them to be importantly interrelated. Perhaps I can do no more than to leave that as a floating caveat which applies to all of the subsequent discussion on vertical restraints.

The problem of tying arrangements has finally been receiving some intellectually respectable attention in the last few years. Bowman, who is a leading representative of what I have referred to as the Chicago school, takes the position that there are many good things to be said in favor of tying clauses. He sees them in one aspect as serving a metering function, thereby enabling a producer to get varying returns depending upon the intensity of use to which his primary product is put.[42] Turner has suggested that this is simply a round-about way of talking about price discrimination.[43] At issue between them also is the question whether anything can be gained by forbidding tying arrangements. This is an example of the kind of debate we need, whether or not it has any immediate effect on the course of decisional law.

The furor about the "quantitative substantiality"[44]

test of Standard Stations[45] has forever obscured rational discussion of the problem of exclusive dealing arrangements. The problems here are what competitively neutral advantages there are to such arrangements, what damage they can do to competition, and what can be done to alleviate the damage. The last question raises, of course, the ubiquitous problem of remedies, both on the level of what can be done within the framework of Section 3 and of what a rationally conceived statute might accomplish.

Much of the discussion is obscured by confusion of the seller's promise and the buyer's promise. When the seller promises not to supply another dealer in the area, that raises the problem of selective distribution, which we will consider in a moment. It is only when the dealer promises that he will not patronize any competing supplier, that the problem of foreclosing sellers' competition arises. It has always been something of a mystery to me why the dealer's promise should be required in order to secure all the advantages of single-minded promotion, dealer loyalty, etc. which are advanced as justifications for exclusive

dealing contracts. That mystification has not been dispelled by even so conscientious a pair of commentators as Lockhart and Sacks.[46] The subsequent history in the courts and the Commission has not, in my view, been particularly illuminating, nor has the breathless attention by the commentators to each little variation in the fever chart of quantitative substantiality added a great deal to an understanding of the issues involved. Nor, I might add, does consideration of these problems seem to me to be materially advanced by this year's slogan: "orderly marketing."[47]

That brings us to the question of selective distribution, by which I mean attempts by a manufacturer to control competition in his own product. The most obvious form is resale price maintenance. The proliferation of law on this subject has tended to obscure the relationship between resale price maintenance and other forms of selective distribution. The other forms, such as channelization and territorial exclusivity, have been well discussed by Judge Rifkind,[48] who in his previous incarnation on the Federal bench wrote an important opinion on the subject.

The question which I would like someone to address himself to is: If resale price maintenance is so bad, why are other forms of selective distribution so good? Or, if you prefer, vice-versa. Here, again, we observe the literature slavishly following the law rather than attempting to lead it. Resale price maintenance is a separate thing. An enormous body of law has grown up about it. Consequently, it is natural enough that comment about it has tended to be limited by the legal boundaries of the subject.[49] At any rate, we have now been pretty well educated about the underlying nature and economic preconditions of resale price maintenance. It is, as Bowman has convincingly demonstrated,[50] a manifestation of monopolistic competition in a Chamberlinian sense, that is to say, a market characterized by many sellers, each enjoying a limited position of market power derived from product differentiation. Resale price maintenance, like the Robinson-Patman Act, represents a triumph of the fair dealing norm over the norm of competition. Not the least of the similarities is that the retailers who are its principal beneficiaries and staunchest political supporters are

thus enjoying the fruits of their own limited monopoly power.

The major legal development with respect to fair trade during the period we are considering was the Supreme Court's decision in the Schwegmann[51] case in 1951. That, as well as other judicial manifestations of hostility to resale price maintenance, has been the subject of many law review comments. I have counted some twenty-seven pieces in the law reviews dealing with the Schwegmann case. The benchmark is Rahl's article on the relationship between the antitrust laws and state regulatory practices.[52] As I read the article, this inquiry was precipitated by the question of what there was about the mere institution of Calvert's suit against Schwegmann that violated the antitrust laws, a question which the Supreme Court did not deal with, although reference to the Court of Appeals' opinion makes it perfectly plain that the question is there. In the course of dealing with this problem, Rahl is led to consider the relationship between the Sherman Act and state regulatory schemes. This in turn leads him to some

very fruitful thinking about the deficiencies of the Sherman Act because of its reliance on contract and conspiracy concepts. Considering the polarities of Schwegmann on the one hand and Parker v. Brown[53] on the other, Rahl comes to the ironic conclusion that the more state-dictated and less privately consensual a scheme of regulation is, the more immune from the Sherman Act it will be. Or, to put it as Rahl does, the more the state policy offends the policy of the Sherman Act, the more immune it will be. This may not be the most startling or earth-shaking thought in the world. Indeed, it may not be as paradoxical as it appears. But it is probably more important than anything else that emerges from the Schwegmann case. Yet, with but one honorable exception, every one of the twenty-seven other pieces on the Schwegmann case which I have examined fails utterly to recognize the problem.[54] There is much talk about the pros and cons of fair trade as a national policy and about the peculiar use of legislative history made by the majority opinion. But the really exciting problem in the case is ignored and it is

ignored, I submit, because one does not even reach it without facing the case's most lawyerly issue. I do not suggest that there is in a lawyer's habits of thought any ready-made approach to antitrust wisdom. I do suggest, however, that one of the great lacks in the literature on antitrust arises from the frequent abdication by lawyers of their lawyer-like functions.

A place where that abdication is less conspicuous is the literature about the Robinson-Patman Act. That strange statute bristles with so many internal inconsistencies that it is often possible to discuss it without an uncomfortable confrontation of basic premises. If one ignores the difficulties of reconciling its provisions with the goal of maintaining the competitive process, he is able to engage in a number of very nice little five-finger technical exercises. The leading work on the subject during this period is Corwin Edwards' judicious appraisal of Robinson-Patman Act enforcement.[55] Among the legal writers, the several articles by Rowe which are to be incorporated into a book on the subject for the Trade Regulation Series are of generally high quality, although their

author's strong anti-Robinson-Patman bias occasionally prevents his giving opposing contentions their full due. As previously mentioned, the little handbook prepared by Austin for the American Law Institute is a model of conciseness and lucidity. The discussion of the Robinson-Patman Act in the Attorney General's Report is one of the best sections of that document.[56] And there have been a number of useful comments on recent developments in the law reviews and the symposia.[57]

Perhaps the major decision under the Robinson-Patman Act since 1945 was the Standard of Indiana[58] case. The literature has been more than usually profuse[59] and has done a satisfactory job of pointing up the conflict between the goals of competition and of fairness which the case epitomizes. Edwards' book includes a well-balanced treatment of the problem.[60] Among the specialized works on the decision, the very careful study of conditions in the Detroit market by the economist McGee[61] seems to me particularly useful.

Literature on the Robinson-Patman Act provides a conspicuous example of the lack of impact which

scholarship in the field has had on the course of decision. A dominant theme in the literature has been the desirability of reconciling the Robinson-Patman Act with the Sherman Act or, more accurately, of playing down Robinson-Patman's emphasis on fairness to competitors as a goal. On the whole, the Court has been deaf to these pleas for subordination except in situations where it probably didn't make too much difference. Examples include the Court's persistent support of the Commission's niggling interpretation of the cost justification defense,[62] its refusal to read the 2(a) defenses into 2(d) and 2(e),[63] and its recent action in upholding the application of 2(c) in all its rigor to a situation just the reverse of the one Congress had in mind when it banned brokerage payments.[64] I am inclined to think that the results in these cases are more consonant with the language of the statute than the critics seem willing to admit. This may be one more example of the futility of employing any but a legislative approach to a problem like price discrimination.

I am now constrained to return to the point which

I made at the beginning of this discussion of the literature on vertical restraints. The most conspicuous shortcoming of that literature, I suggested, was its failure to consider the relationships among the various forms of vertical or unilateral conduct. We can no longer ignore this deficiency when we come to consider a residual category which has received no attention as such. We may call this category something like "single firm conduct not amounting to monopolization and not subject to any other specific statutory prescription." Examples of cases involving this category are GMAC,[65] Lorain Journal,[66] A & P,[67] and Times-Picayune.[68] All of these cases involve unilateral restraints imposed by a powerful firm. None of them falls into a readily recognizable pigeon-hole of prohibited conduct. GMAC and Times-Picayune would have been Section 3 cases were it not for doubts occasioned by the restrictive term "commodity" employed by that section. Because these doubts precluded reliance on Section 3 it was necessary to bring these cases under the Sherman Act. Thereby an interesting conceptual problem was created which, when squarely faced, tends to illuminate the

difficulty of using the Sherman Act to deal with single-firm conduct. In GMAC the solution was the use of intra-corporate conspiracy doctrine. In Times-Picayune, it was the fortuity of contracts which were held to be contracts in restraint of trade. Both cases, realistically viewed, involved coercion rather than conspiracy or contract. The same is true of A & P, which solved the problem of deciding what the violation was by ignoring it.

Perhaps "attempt to monopolize" is a closer approximation of the realities of the conduct involved. It was employed in Lorain Journal in a situation which seems economically indistinguishable from Times-Picayune. Its relative lack of utility derives from the limitations it has carried over from the criminal law, particularly the "specific intent" requirement. The impact of criminal law doctrines on antitrust law is a subject that has received no attention and which, in my opinion, is essential to an understanding of the strengths and weaknesses of the Sherman Act as an instrument of public policy.

None of these makeshifts -- whether it be conspiracy, contract, or attempt to monopolize -- can be intelligently discussed without an understanding of why they are being used. The entire dreary debate on "intracorporate conspiracy"[69] is theological and ritualistic rather than functional in character because it proceeds on a level of discourse that ignores what is at stake. The proponents of intracorporate conspiracy content themselves by making the factually accurate but economically irrelevant point that all business conduct involves a plurality of actors. By so doing, they deliver into the hands of their opponents, who by and large make up the Antitrust Establishment, a fine argument based upon *reductio ad absurdum*.[70] On the whole, I think the opponents have the better of the argument in strictly logical terms. But both sides seem to me to have pretty well missed the main question, which is whether it is possible to find a way of dealing with the anti-competitive activities of a single firm and the subsidiary point that the Sherman Act may not be well-adapted to dealing with single-firm conduct.

Structural Problems. The frankly structural problems of antitrust are those which have received by far the largest share of attention. While this aspect of the field is unquestionably overwritten, even by comparison with the rest of antitrust, it is possible to report that many useful pieces of work have been done.

The problem of vertical integration, or more accurately, the problem of whether vertical integration is a problem, has been excellently treated in a number of studies,[71] notable among which are those of Adelman[72] and Bork.[73] We can thank the hapless A & P decision for having generated a large body of useful literature, primarily because of the sharply differing views of the case taken by Adelman on the one hand and Dirlam and Kahn on the other.[74] In addition to the more specialized studies on aspects of vertical integration, there is detailed treatment of the problem in Hale and Hale,[75] to whose industry we are indebted for a book which deals interestingly with the whole range of structural problems. And the treatment of Kaysen and Turner,[76] brief though it is, is an excellent statement of the considerations which make vertical

integration as such a useless peg on which to hang judgments about antitrust policy. The relationship between vertical integration by ownership and vertical integration by contract is discerningly treated in a monumental study by Kessler and Stern,[77] which is a fitting sequel to its senior author's initial venture into the field via the notorious automobile dealers' franchise legislation.[78]

The legislative revitalization of Section 7 of the Clayton Act has given rise not only to renewed, if tardy, enforcement activity but also to a vast secondary literature.[79] I am particularly impressed by Markham's useful article[80] analyzing the proceedings initiated by the Department of Justice and the Federal Trade Commission under the amended statute, which has the virtue of being one of the few macrocosmic studies of antitrust enforcement, and by Neal's article on the Transamerica decision by the Federal Reserve Board,[81] which uses that rather special case as a basis for a keen general analysis of the difficulties placed upon a tribunal confronted with the test of illegality established by Section 7. I get

almost as little out of the literature on Dupont - GM and Bethlehem-Youngstown as I do out of the cases themselves.[82] Both decisions have been the subject of pointed comment by Adelman,[83] whose articles have, among other virtues, that of brevity.

The problem of single firm monopoly has received attention out of all proportion to its probable importance in the national economy, another instance of the tendency of antitrust scholarship to follow antitrust litigation. The Shoe Machinery case is responsible for Carl Kaysen's unique industry study, developed during its author's service as "law clerk" to Judge Wyzanski in the trial of the case.[84] The principal survivors of the considerable literature about the Cellophane case are Stocking and Mueller,[85] whose article has the melancholy distinction of having been heavily cited by the Court while its teaching was being ignored, and Turner's excellent article[86] which exposed neatly the fallacy in the Court's attempt to use cross-elasticity of demand as the sole criterion for defining the bounds of the market. The literature on the oligopoly problem is sizeable, but consists

mainly of works by economists.[87] As previously noted, the Kaysen-Turner book deals with the problem of framing a legislative policy for checking the existence of market power exercised jointly by interdependent oligopolists.

Problems of Coverage. Under this heading, we will consider the literature on a miscellany of antitrust issues which have as their unifying theme the reach of the federal antitrust laws.

The relationship between the federal antitrust laws and state regulatory schemes has not been the subject of general analysis, despite the fact that the area of potential conflict is a broad one. The resale price maintenance problem appeared for a time to pose the issue when the Supreme Court construed the Miller-Tydings Amendment as inapplicable to enforcement of fair trade against non-signers. Before the conflict was resolved by the McGuire Act, a perceptive analysis of the problem was provided by Rahl.[88] Another area of potential conflict is the body of state statutes prohibiting sales below cost. These have been well treated in an article which points out their

inconsistency with the federal antitrust laws.[89] Congress blocked off yet another area of conflict in the McCarran Act[90] after the Supreme Court's decision in South Eastern Underwriters[91] brought the activities of the insurance business under antitrust scrutiny. There are other areas of doubt, and it would be helpful to have a general examination of the relationship between federal antitrust policy and state regulatory schemes which either protect or compel restrictive trade practices. On the other side of the coin, there are the state laws which protect competition (or competitors). The scarcity of literature about these laws and how they might be improved doubtless reflects the relative absence of enforcement.[92] However, current efforts in New York[93] and California[94] may presage a revival of state antitrust enforcement, which in turn may be expected to promote discussion of the problem. We have here another instance of the close relationship between antitrust law in action and antitrust law in books. If this is a virtue of a practitioner-oriented scholarship, it is also a deficiency.

By contrast, the literature on antitrust in

foreign trade has proliferated, and for doubtless the same reason. Much of the literature has been devoted to a re-fighting of the jurisdictional problem and is of a largely polemic nature.[95] The substantive problems are treated carefully in Brewster's admirable study,[96] commissioned by the Association of the Bar of the City of New York. In a way, the foreign antitrust field is a kind of microcosm of the field as a whole, since most of the problems that arise at home can also arise in foreign trade. Consequently, Brewster's book is not only the leading work on its special subject but is also one of the few really good general examinations of antitrust. For example, his book contains the best discussion of rule-making, clearances and legislative exemption, enforcement problems which transcend the foreign antitrust field.[97] One of the fine features of the Brewster book is its carefully pruned critical bibliographies[98] which offer better help, at least to the reader in search of quality rather than quantity, than do the omnibus notes so dear to the hearts of many antitrust writers.

The problem of the labor exemption has remained

dormant since the Supreme Court's decision in Hutcheson.[99] There is a brief discussion of the problem in the Attorney General's Report,[100] which evoked useful comments by labor specialists.[101] Cox's analysis is the most useful study of the problem, although he perhaps over-emphasizes the difficulties of formulating antitrust policy for labor activities. His approach is adopted by Kaysen and Turner in their brief discussion of the problem.[102] There has been a good deal of thunder on the right, which takes the position that the "labor monopoly" should be treated just like any other monopoly.[103] If there is a middle ground, it remains to be explored.

In the important but confused area where antitrust policy and the regulated industries -- those where either entry or prices or both are subject to public control -- intersect, we can observe a curious phenomenon in the literature. More attention has been paid to the procedural problem of timing presented by the so-called primary jurisdiction doctrine[104] than to the substantive question whether antitrust or regulatory standards or both are to be applied and if both,

then how the two are to be blended. Recent decisions suggest that there may be greater room for the application of antitrust law than had been supposed,[105] although there exist difficult and as yet unsolved problems of statutory construction which are only beginning to be examined.[106] Here, too, the important task for scholarship is to re-examine basic premises rather than to tinker with trivia. The premises of government regulation, stemming as they do from bygone eras, may no longer be adequate for an economy which has a great deal more dynamism left in it than was generally supposed a generation ago. A fresh look by uncommitted minds at the regulatory schemes in such industries as transportation, natural gas, radio and television, is long overdue. While the issues in such a review far transcend the question of the role of antitrust policy, it is plain that students of antitrust should have something to contribute to the discussion.

Administration and Enforcement. Under this heading we will briefly consider scholarly work in the vast area of what the late Walton Hamilton called Antitrust in Action.

The distribution of enforcement authority (particularly the basic concurrent jurisdiction of the Justice Department and the F.T.C.) has been commented upon extensively[107] but there has been surprisingly little factual documentation for the generally expressed conclusion that the present system works well and ought not to be interfered with. In order to provide an adequate basis for making such a judgment, we need systematic investigation of how the process of case selection actually works and macrocosmic studies of the enforcement records of the antitrust agencies.

Certain aspects of the enforcement process have been the subject of extensive comment. There is a sizeable literature on the procedural and evidentiary problems of the Big Case.[108] The subject of proof of injury and measure of damages in treble damage actions has been thoroughly and competently covered.[109] And the subject of consent judgments has received much attention.[110]

Other subjects have been comparatively slighted. There is no treatment, for example, of the anomalies of appellate jurisdiction under the various antitrust

laws, whereby cases of equal public importance may or may not get expeditious treatment and mandatory Supreme Court review depending upon purely mechanical factors which have nothing to do with the merits. There has been very little in the way of follow up studies of remedial provisions in antitrust decrees although in the antitrust-patent field there have been encouraging steps in this direction.[111] And the manifold problems of the "criminal side" of antitrust have received no discriminating attention. We need to know whether the costs of criminal enforcement -- particularly the suble costs of doctrinal rigidity -- outweigh its benefits. Before we can know that, we have to know what the costs and benefits are.

Above all, we need a lot more clues than we now have about the practical effect of the antitrust laws. I do not mean by this the question whether Industry A is more or less competitive than it would have been absent antitrust litigation. That question is rather a simple-minded one, and the limits of utility in framing answers are well-demonstrated by the two-volume Twentieth Century Fund study,[112] which seems

to me to have little value except as a sketchy series of industry studies combined with factual information about the extent of antitrust activity in the areas concerned. Rather, I think we need to know a good deal more than we do about the ways, obvious and subtle, in which the activities of American businessmen are conditioned by the existence of the antitrust laws. The job is one in the sociology of law, but it is one which can probably be better undertaken by legal scholars with sociological interests than by sociologists with legal interests. One obvious source of raw material is the files and recollections of lawyers specializing in antitrust matters. Granting the difficulties of obtaining access and protecting confidentiality, I would think that an imaginative project along these lines, taking perhaps the form of a few intensive case studies of the modification of conduct by antitrust considerations, would be of the greatest interest.

If we take the aim of legal research to be nothing more pretentious than "systematic inquiry designed to gain ideas, insights, or information relevant to the solution of important problems,"[1] it is evident that antitrust research assays very low. I have collected in Appendix II citations to the work done by legal scholars in the last fifteen years that has seemed to me particularly useful. The list is depressingly short, considered in relation to the total research output. On the other hand, it may be and I think it is a hopeful sign that so much of the really good work has been published within the last few years. But the fact remains that only a very small proportion of what has been done in the field can be called "useful" for any definable purpose other than to keep people busy.

It would be easy to conclude, given the "doctrinal" nature of most of the writing in the field, that the basic trouble is that there has been too much of that sort of research and not enough research outside the books, the kind of thing which is fashionably called field research. That conclusion would be, as

I hope I have made plain, an erroneous one. It is true that there has not been enough field research. It is also true that there has not been enough doctrinal research of the right kind.

It is difficult to talk about research methods without considering the ends sought to be achieved. Nonetheless a few conclusions about method do suggest themselves, primarily with respect to the work of legal scholars (it would be presumptuous to tell economists interested in problems of industrial organization how they should go about addressing themselves to the field of antitrust). First, it seems plain that a grasp of economic analysis is a necessary (although not a sufficient) piece of equipment for useful work in the antitrust field. The best work in recent years has come from people who have such a grasp and who apply economic theory in a very explicit way to the study of antitrust problems. Second, there has not been adequate attention to the legislative approach. The common law tradition is simply not equal to the demands of this complex area; more work is needed that asks the question: how might we wisely legislate

with respect to this problem? Third, disproportionate attention has been given to the output of the formal decision-making processes. We need to know something about informal dispositions and, more importantly, something about the impact of antitrust at the level of private activity. Research outside the library is needed to accomplish this end.

There is nothing very startling about these conclusions about the shortcomings of research methods in antitrust. Indeed, I do not think that there is anything special about the needs of this field as opposed to others. The task here as elsewhere for legal research is to explore, with all the equipment at its command, the range of competing goals, to articulate criteria for choice among the possible goals, and to devise methods (including both rules and institutions) for maximizing the desired goals. It is hard to discern in the literature on concerted refusals to deal, to take only one example, much that is directly responsive to the requirements of these tasks.

The villain of the piece, if there is one,

is the narrowly practitioner-oriented character of antitrust research, a character that derives from the characteristics of antitrust law which I enumerated in the first section of this paper. In this sense antitrust research needs to be much more academic than it is, by which I mean much freer of the constraints of the moment. We could use a two-year moratorium on further publication but of course we will not get that. The flow will continue, but perhaps a few of those who contribute to it will be moved to stay their hands long enough to ask themselves just what it is they are trying to do.

I have spoken approvingly of the contributions by economists to the literature of antitrust. What makes those contributions so valuable by comparison with the bulk of legal research in the field is that they proceed systematically from a carefully considered and examined set of premises. This is largely missing in the legal literature. To the extent that it is present, it seems to be based on some competence in the lore of economics. But there are two drawbacks to the utility of work in the economic mode. One is that it leaves

out of account (and at its best recognizes explicitly that it does so) considerations which do not fall within the special competence of economists. Those considerations, which are vaguely referred to as social or political, require more discriminating attention than they have received. The other drawback is that economic analysis does not embrace the distinctively legal skill of providing workable forms of solution through the operation of legal rules within legal institutions. A rough example of what I mean is the difference between the generalized norms of desirable structure and performance elaborated by the literature on workable competition and the specific legislative proposals advanced by the law-economics collaborative effort of Kaysen and Turner. Even if we know what the goals are toward which we want to work, there remains the considerable job of determining whether existent ordering devices are well-adapted for achieving those goals and, if not, what changes should be sought.

In the light of these rather general comments, what can be said about possibly useful directions for antitrust research? One must start with the general

caveat that there is little profit in trying to tell other people what they ought to be doing. The remarks that follow should not be viewed as a "program" but rather as a suggestive checklist, drawn in the main from points scattered throughout this study.

Starting with the more traditional forms of legal research, I should say that the major need is for a re-examination of existing law, particularly those parts of it which seek to regulate conduct (as opposed to those which seek to shape industrial structure) in an attempt to discern the goals toward which the law works and to evaluate the adaptation of means to those goals -- in short, to devise an adequate conceptual framework for the systematic study of the subject.

There are many avenues of work which should lead to this objective. On the whole, I do not think that the preparation of a "treatise" a la Williston, Wigmore (or even Corbin) is such an avenue. To the extent that the American Law Institute proposal contemplated such an effort, it is probably just as well that it was never undertaken.

We need a critical re-examination of the leading

cases with far more scrupulous attention to just what they did and did not decide than is manifested in, say, the Attorney General's Report. I do not think that the notion that we have a coherent and symmetrical law of antitrust would survive such an examination. From such a study should emerge a more solid basis than we now have for determining whether the existing statutes are well-adapted to their purposes. I think such a study would show that the Emperor lacks, if not any clothes at all, at least a wardrobe befitting his rank and station. Another way of tackling the same general problem would be to re-examine some of the supposed lines of antitrust doctrine. What do we mean by per se rules? Do we have any? What are they and what are their limits? Do they make sense?

I have mentioned before the desirability of an examination of the "criminal side" of antitrust from both the doctrinal and the enforcement standpoints. What has been the impact of criminal law doctrines such as conspiracy and attempt on the development of antitrust law? Are they well-adapted to solving the problems which antitrust law confronts? What effects

are traceable to statutory patterns that embody criminal and civil proscriptions in the same terms? These are questions which are shamefully neglected in the literature.

Another major area of inquiry is the effect of antitrust law. We need to know more about enforcement than we do. First, there is the problem of direct enforcement. What is the process of case selection? How can it be made more effective? In order to get answers to questions such as these, we need to have scholars who are willing to live with the enforcement agencies and enforcement agencies that are willing to have scholars live with them. We also need many more macrocosmic studies of the various kinds of antitrust enforcement. The problems of remedies or sanctions deserve more study. We need both empirical investigation of the effects of antitrust remedial decrees and imaginative thought about how remedial decrees can be made more useful than they are.

All of these questions go to the matter of direct enforcement, which involves principally judicial and administrative processes, although it also involves

in an important way the coercive effects of legislative inquiry. We know something about these matters, although not nearly as much as we need to know. But we know almost nothing about the equally important aspect of indirect enforcement. What is the impact of antitrust law and ideology on the behavior of business enterprises? Are the ascertainable modifications of behavior which result from antitrust considerations such as we really want to have compelled by the pressures of the law?

It is apparent that no hard-and-fast line between doctrinal and empirical research can be drawn with respect to any of the major lines of inquiry which I have just sketched. We plainly need both. Both are necessary for the successful devising of legislative programs which should perhaps be the ultimate object of research in the antitrust field.

To what extent does a reshaping of research goals along these lines require changes in our present institutional arrangements for conducting legal research? I think that a good deal of the work I would like to see done can be done within the existing research

framework. But some modifications are desirable. If we could have one or two major continuities such as the Harvard-Merrill project or the Chicago antitrust project, it would undoubtedly facilitate the progress of ambitious long-term work, particularly such as involves empirical research. Legal scholars require a frame of reference broader than the law review article for carrying on significant work in antitrust. The pressure to publish -- whether it comes from the Academy or from the Bar Association -- is at war with the kind of work which needs doing. In this respect, as in most others, the problems facing antitrust research are not very different from those which face legal research in general.

This study was based on a consideration of what appeared to me to be the most significant items in the literature turned up by a systematic search through September, 1960. I have undertaken no such systematic search of the literature that has appeared since that time, but have confined myself to tracing further some notions developed at length in the basic study. In this Addendum, I shall mention a few points that seem to call for further comment in the light of recent work.

1. The relatively unexploited possibilities inherent in a judicious use of field research techniques are exemplified in an excellent note on restrictive distribution practices that also has the merit of calling attention to the relationship among practices that are usually dealt with seriatim under such familiar labels as exclusive dealing, resale price maintenance, and territorial exclusivity.[1]

2. There is a noticeable trend toward larger-scale work by legal scholars, exemplified by Fulda's book on competition in the transport industries,[2] by Rowe's work on Robinson-Patman,[3] and by the continuing

series of articles by Hale and Hale[4] on competition in the regulated industries.

3. The study of competition in the regulated industries is proceeding at an increased tempo. In addition to the relevant items mentioned above, two excellent studies have appeared in the proceedings of the A.B.A. Section on Antitrust Law by two younger scholars in the field, Professor William K. Jones of Columbia[5] and Professor Roger Cramton of Michigan.[6] These papers tend also to suggest that the Section is assuming a somewhat more constructive role in stimulating worthwhile publication than has hitherto been noticeable.

4. The appearance of a new publication, The Supreme Court Review, has resulted in two articles of the highest quality. The first, by Dean Levi, is a study of the Parke, Davis decision in the light of a meticulous examination of the Colgate doctrine.[7] Its theme is the Sherman Act as common law; it is a worthy case study from the scholar who gave us An Introduction to Legal Reasoning. The second, by Professor Derek C. Bok of Harvard, is a study of the Tampa Electric case and of the criteria for decision under Section 3 of

the Clayton Act.[8] It is discussed in some detail below. Both of these studies suggest that the stance assumed by the editor of The Supreme Court Review, that a specialized forum is needed for responsible professional criticism of the work of the Supreme Court, is a promising one for antitrust scholarship, given the unique role of the Court in that field.

5. Most significant, to my way of thinking, is the appearance of three studies that exemplify the attempt to create viable doctrine that has seemed to me so important to the work of scholars in the antitrust field and so largely lacking in the work surveyed in the main portion of this study. Two of these are the work of Professor Bok who, with them, has established himself as one of the first-rank scholars in the antitrust field. The third confirms the pre-eminent position of his Harvard colleague, Professor Turner. There is a unity to these three works: all of them are concerned with central rather than marginal problems under the antitrust laws; all of them are creatively original attempts to provide useful working generalizations; all of them eschew the "mere recitativo"[9] that characterizes

so much work in the antitrust field; all of them exemplify the "return to doctrine"[10] that underlies Wechsler's much-misunderstood call for the formulation of neutral principles.

In his first work, on the problem of mergers under Section 7 of the Clayton Act,[11] Bok addresses himself to the contribution that economic analysis can make to the resolution of antitrust problems and, in particular, to the formulation of standards capable of being utilized by the legal process. After rejecting on highly persuasive grounds three current approaches to the resolution of merger problems and analyzing in detail the failure of current approaches in the context of the Brillo case, Bok addresses himself to the framing of standards in a specific context: the acquisition of a competitor by the largest firm in the industry. He reaches conclusions with which not everyone will agree, but his closely reasoned analysis is a model of the sort of work that needs doing and bears out his assertion that his theme is "methodological rather than programmatic."[12] He then deals in considerably less detail with other problems in horizontal

mergers, sketching an approach that will sustain considerable further work. The length and texture of his article are somewhat intimidating; but it is a world apart from the thin and superficial treatment given the subject by most commentators.

In his second article, Bok uses the Tampa Electric case to demonstrate the vacuity of judicial discourse on Section 3 of the Clayton Act. If read and pondered by the principal actors in the quantitative substantiality debate, it should put an end to that bit of theological disputation. Bok goes on to elaborate an analysis similar in method to that employed in his merger study. He concludes with some useful observations on what can be expected from the various institutions of the legal process -- courts, agencies and legislatures -- in improving the doctrinal framework. In the end, he considers a topic rarely considered by legal commentators: the role of legal criticism. His conclusion is one that, for obvious reasons, I cannot resist quoting:

> "In the face of such deficiencies as these, it is hard to escape the feeling that all of the agencies that affect

> the development of antitrust law, legal criticism has fallen farthest short of realizing its potentialities. From any serious standpoint, however, this is a conclusion that calls for rejoicing rather than despair, for without such unused capabilities there could be little possibility for reform."[13]

Turner's article, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal,[14] may well be its author's finest work to date. He demonstrates the difficulties of using "agreement" as a key to Sherman Act liability in terms both of logic and economic reality. In distinction to his book (with Kaysen), the approach here is judicial rather than legislative: Turner attempts within the framework of the Sherman Act to articulate meaningful distinctions capable of judicial application. Recognizing that agreement in the sense of consciously interdependent decisions characterizes much behavior in oligopolistic markets, he proposes the following questions as relevant, quotation of which hardly does justice to the lucid and sophisticated analysis that precedes them:

> "(a) is the conduct simply the rational exploitation of the profit potential of a current oligopoly position; or is it, on the contrary, restrictive conduct

> which protects or augments market power or extends it into other markets? and (b) can the conduct be effectively enjoined, with good prospect for materially increasing competition, without involving the courts in a regulatory function for which they are not normally adapted?"[15]

It needs to be noted, and the point is not without relevance to this study, that these two questions ignore -- the first implicitly, the second explicitly -- the criminal side of the Sherman Act and the difficulties (possibly of constitutional magnitude) that attend the interpretation of a statute whose civil and criminal proscriptions are couched in identical language. We continue to lack the exploration of the criminal side of the Sherman Act from a doctrinal standpoint that will shed some light on this problem. That difficulty aside, Turner's article seems to me the longest step forward in basic Sherman Act doctrinal analysis that I have read.

6. The appearance of three studies of such outstanding quality in the space of less than two years seems to me a very happy augury for the future of antitrust scholarship. They represent a trend that

characterizes much of the work of younger scholars in the field. We are witnessing a "return to doctrine" that promises here as elsewhere in the law to advance thought about the legal order in terms, not of closed systems, but of the purposes that the legal order ought to serve.

Antitrust Casebooks and the State of Legal Research

Some years ago Professor Robert R. Bowie of Harvard Law School published a casebook entitled Government Regulation of Business. This work was notable in that it contained not a single word of text by the editor, not even so much as an explanatory preface. Nor was the editor's guiding hand to be seen anywhere else, since the casebook consists of leading cases in the antitrust field, reprinted in their entirety from the West Reporter System and arranged in chronological order. I do not have any first-hand knowledge about Professor Bowie's reasons for compiling this casebook or, having compiled it, for remaining silent about his reasons for doing so. However, it struck me that a report on the state of the casebooks as a reflection of the state of legal research in antitrust law might well take the form of an imaginary preface to the imaginary 1960 edition of Bowie's enigmatic casebook.

* * *

The main thing a casebook, particularly a casebook in a new field, has to sell is its organization.

Its editor is assumed to have at his fingertips all the relevant material. He knows what is important and what is not important. He has a concept of what the field as a whole looks like. He has, in short, an organizing principle.

I offer this chronological compilation of antitrust decisions as an earnest of my judgment that none of the existing casebooks reflects an adequate principle of organization. In the present state of the art, one man's organizing scheme is not likely to be any better or any worse than another's. Consequently, the only honest thing to do is to provide you with the raw materials and let you go to it yourself.

To substantiate what may perhaps be regarded as a surprising assertion, let us consider the organization of the principal casebooks in the antitrust field. First, there is Oppenheim's current edition. It is the most widely used casebook in the antitrust field and it represents the culmination of its editor's long and useful labors. Yet it fails to reflect any valid organizing principle.

After some introductory materials which include some useful notes on coverage and exemptions, Oppenheim plunges into the substantive law with "Part Two. Offenses under Sections 1 and 2 of the Sherman Act." Here we are at once faced with a major trouble. Sections 1 and 2 of the Sherman Act do not reflect any functional classification of problems which arise under them. The general rubric involves both spurious unity and spurious diversity. This becomes clear upon examination of the detailed contents of "Part Two." It starts off with a chapter on "Agreements and Indirect Arrangements Among Competitors Involving Price." This chapter includes Trenton Potteries, Appalachian Coals and Socony-Vacuum. So far, so good. But then come co-equal chapters on "Division of Markets Among Competitors" and "Trade Association Activities of Antitrust Significance." This co-equal division obscures the point that the activities referred to are merely aspects of arrangements "Involving Price," and have antitrust significance for that reason only. In particular, this division obscures the point that the trade association cases are simply an illustration,

and an excellent one for teaching purposes, of the difficulties of prescribing a "per se" rule with respect to something called "price fixing."

There follows a chapter on resale price maintenance. I suppose that it is located here because Fair Trade and its non-legislative precursors are referred to Section 1 of the Sherman Act for decision and because they represent the most obvious example of what is often called "vertical price fixing." Hence the juxtaposition with "horizontal price fixing." But the parallelism in terminology tends to obscure the lack of any functional relationship between the two categories. "Horizontal price fixing" is the prototype of impairment of competition through agreements among rivals on the same plane of competition. "Vertical price fixing" is only one of several ways in which a single firm manages to exploit market imperfections to its own advantage. The affinities of resale price maintenance are not so much with "horizontal price fixing" as with the constellation of devices whereby a manufacturer seeks to control competition in his own product at subsequent distributional levels. An

example is "territorial exclusivity," which Oppenheim treats several hundred pages further on under the general heading of "Exclusive Arrangements."

Oppenheim then takes up "Special Problems of Conspiracy," a topic within which he treats both "conscious parallelism" and intracorporate conspiracy. The first of these serves as a useful prelude to consideration of oligopoly problems, but its value at this point is greatly attenuated by the fact that many of the practices involved in the conspiracy cases, notably "boycotting," have not been reached at this juncture. The intra-enterprise conspiracy material has nothing in common with the material on "conscious parallelism" other than the concept of "conspiracy." It represents one of a variety of more or less artificial attempts to use Section 1 of the Sherman Act to reach single firm conduct, a topic which can only be understood in the context of a general examination of vertical or unilateral practices.

Oppenheim then concludes "Part Two" with a coherent account of "Monopolization Under Section 2 of the Sherman Act." I call it "coherent" because this is

one of the few instances in which the statutory provision and the problems referred to it for solution have any functional unity. Its inclusion in "Part Two" is puzzling, though. What do the "conduct" problems of "price-fixing" have in common with the "structure" problems of "monopolization" except the fortuity that the legal prescriptions governing litigation about them happen to be found in the same statute?

The artificiality of classification by statutory provision becomes apparent when one is forced to make the transition from "Part Two," dealing with the Sherman Act, to "Part Three," dealing with "Mergers." That portion of "Part Two" dealing with structural problems seems much more at home with the material in "Part Three." It appears that much unnecessary repetition could have been eliminated by consolidating the treatment of explicitly structural cases. It is, for example, questionable whether the separate treatment of market definition problems, once under the "Monopolization" heading in "Part Two" and again under the "Mergers" heading of "Part Three" is functionally sound.

Up to this point, despite the reservations that I have expressed, a fairly logical progression from problems of conduct to problems of structure can be discerned, at least if one ignores the chapter headings. From this point on, however, I am unable to discern any rational organizing principle at all. "Part Four" is entitled "Selection of Customers and Marketing." It has two chapters. The first is called "Refusals to Deal" and includes wholly unrelated material on individual refusals and concerted refusals. As in the case of horizontal and vertical price fixing, a parallelism of terminology creates a misleading impression that the subjects have something to do with each other. Functionally they do not. Individual refusals to deal cover the entire range of single firm conduct in aid of the maintenance of market position. It is doubtful that any meaningful generalizations can be drawn about them, apart from consideration of the types of vertical restraints which they are used to implement. Concerted refusals to deal, or "boycotts," on the other hand, are plainly an aspect of the general problem of collaboration among competitors,

which Oppenheim introduced some six hundred pages back and then dropped. The heading "Exclusive Arrangements" for the next chapter likewise conceals an absence of unity in its contents. On the one hand there are arrangements designed to restrict competition in the seller's own product. On the other, there are arrangements designed to restrict the market available to the seller's competitions. These devices may be and often are used together, but they implicate very different considerations.

"Part Five," "Patents and Antitrust," is equally bewildering in its organization, mingling as it does problems of joint activity among competitors and problems of the exploitation of monopoly power by individual firms. The only unifying principle in this section is that all the cases involve patents. By adopting this non-functional classification, Oppenheim obscures the relation of patent pooling arrangements to the general subject of agreements among competitors and misses a valuable opportunity to confront the student with important questions about the scope and extent of the price-fixing dogma laid down in Socony-Vacuum.

The succeeding section on "Foreign Commerce" probably requires separate treatment, although I think it could have profited by consolidation with material appearing elsewhere on the commerce clause, on labor activities, and on the relationship between the Sherman Act and state laws and policies relating to competitive enterprise.

The Oppenheim casebook, in short, does little to organize the large and confusing subject of antitrust law in a way that makes it at all comprehensible to the student or, for that matter, to the advanced scholar.

No more can be said for its leading competitor, Handler's Cases on Trade Regulation, the third edition of which has just appeared. This edition does not differ materially in organization from the earlier versions, the first of which was published in 1937. The book is in reality two separate casebooks, the first dealing with "Preservation of Competition" and the second with "Unfair Competition." These comments will be directed only to the first.

After an introductory chapter, Handler presents a long chapter entitled "Restraint of Trade." The

first four sections of this chapter are general and historical. The meat of the chapter is a section entitled "Loose-Knit Combinations Under Sherman Act After 1911." It jumbles "horizontal" and "vertical" price-fixing in the same indiscriminate manner as the Oppenheim casebook, although there is an attempt to bridge the gap by presenting the Paramount case as an example of both. The presentation of conspiracy material likewise suffers, as does the Oppenheim book, from the juxtaposition of "conscious parallelism" and intra-corporate conspiracy. Whatever consistency inheres in the organization of the chapter on "Loose-Knit Combinations" is vitiated by the succession of an apparently co-equal chapter on "Boycotts Under the Antitrust Laws," which mingles in a confusing way materials on individual and concerted refusals to deal. The parallel with the Oppenheim organizational scheme is striking, as is also true of the next chapter, entitled "Tying Restrictions and Exclusive Arrangements."

The book's strongest feature from an organizational standpoint is Chapter 5, alliteratively entitled "Monopolies, Markets and Mergers," which presents a

unified and integrated treatment of structural problems. It is followed, however, by a chapter on "Patents and Antitrust" which falls into the same error as the Oppenheim casebook of juxtaposing material on wholly dissimilar situations just because they all involve the use of patents.

The clearest advantage which the Handler casebook enjoys over Oppenheim's lies in its editor's inclusion of a chapter on "Price Discrimination." I do not understand how a rounded treatment can possibly be given to the subject of vertical restraints without some consideration of price discrimination. However, Handler's advantage in this respect is somewhat mitigated by his failure to relate the material on price discrimination to material on other vertical restraints, such as exclusive dealing and tying arrangements.

Other casebooks in the field (with one exception, presently to be noted) all suffer from the same organizational deficiencies as beset Oppenheim and Handler, without the virtues of those collections. These organizational deficiencies may be traced back through earlier editions of the books in question and, indeed,

to earlier casebooks, particularly Oliphant's Cases on Trade Regulation, published in 1923, which was the precursor in the American Casebook Series of the Oppenheim work and which also influenced the organization of Handler's first and subsequent editions. Perhaps we were not ready in the 1920's, or even in the 30's or 40's, for a fresh attempt to work through the major problems of antitrust in terms of their relationship to each other. But this deficiency of synthesis becomes harder to put up with the more bulky and unwieldy the material to be ordered becomes. An attempt to remedy this deficiency should be a prime item of business for antitrust scholarship.

I have said nothing about Schwartz's brilliant and provocative organization of materials dealing on a comparative basis with the "free" and "regulated" sectors of the economy in his Free Enterprise and Economic Organization (2nd ed. 1959). Among its many other virtues, this book presents the outlines of a reasonable scheme of organization, recognizing as it does the underlying components of "structural" problems, problems of "horizontal" conduct, and problems

of "vertical" conduct. Its main defect, in my view, is that it puts the cart before the horse: it attempts to enlarge our understanding of two areas by treating them comparatively without having entirely resolved the analytical difficulties which impede an understanding of at least one of the two things being compared. Still, this casebook is an intellectual achievement of the first order and in my judgment comes closer to providing a basis for a reasoned grasp of antitrust law than anyone else has provided in this art form. To the extent that it falls short, it is because the basic problems of antitrust law as such remain to be thought through. Whether this re-examination is undertaken for the first time in a casebook or in some other art form is not important. What is important is that it be undertaken.

This smorgasbord from the West Reporter System is presented in protest against what has been a conspicuous failure of antitrust scholarship.

* * *

This imaginary preface is, of course, shockingly unfair. A casebook reflects more than an adequate

organizational scheme although, as I have suggested, a casebook cannot be considered really successful unless it enlarges the student's understanding by presenting him with a convincing conceptual framework.

As repositories of existing scholarship, the leading casebooks are admirable. Both Oppenheim and Handler have valuable text notes, which obviously represent much careful research and thought. (Schwartz is especially strong in this respect, both in the extent of his original work and in its quality.) Oppenheim provides incomparable bibliographical assistance. Every heading and subheading in his book is accompanied by a thorough and frequently exhaustive bibliography on the subject matter. His display of industry is boundless and discouraging. One wishes only that he had given the reader the benefit of his own views as to the merits of the various works cited. Viewed from the same standpoint, Handler's work is hardly inferior to Oppenheim's. Both books mirror with great fidelity the state of legal research in antitrust. Its richness, its diversity, the enormous effort that has gone into producing the body of literature, all these are

faithfully reflected. Reflected too, and this has been the burden of my comments, is the absence of critical analysis which seems to me to be the chief deficiency in antitrust research to date.

A Compilation of Outstanding Work in the Antitrust Field: 1945-60

I. Work by Economists

A. Books

Adelman, A & P - A Study in Price-Cost Behavior and Public Policy (Harvard Economic Studies 1959).

Bain, Barriers to New Competition (1956).

Bain, The Economics of the Pacific Coast Petroleum Industry (Part I, 1944; Part II, 1945; Part III, 1947).

Dirlam & Kahn, Fair Competition: The Law and Economics of Antitrust Policy (1954).

Edwards, The Price Discrimination Law (1959).

Kaysen, United States v. United Shoe Machinery Corporation (Harvard Economic Studies 1956).

Kaysen & Turner, Antitrust Policy (1959).

Mason, Economic Concentration and the Monopoly Problem (Harvard Economic Studies, 1957).

Nicholls, Price Policies in the Cigarette Industry - A Study of "Concerted Action" and Its Social Control, 1911-50 (1951).

B. Articles

Adelman, The Consistency of the Robinson-Patman Act, 6 Stan. L. Rev. 3 (1955).

Adelman, Integration and Antitrust Policy, 63 Harv. L. Rev. 27 (1949).

Bowman, Prerequisites and Effects of Resale Price Maintenance, 22 U. Chi. L. Rev. 825 (1955).

Director & Levi, Trade Regulation, 51 Nw. U. L. Rev. 281 (1956).

Letwin, The English Common Law Concerning Monopolies, 21 U. Chi. L. Rev. 355 (1954).

McGee, Predatory Price Cutting: The Standard Oil (N.J.) Case, 1 J. Law & Econ. 137 (1958).

McGee, Price Discrimination and Competitive Effects: The Standard Oil of Indiana Case, 23 U. Chi. L. Rev. 398 (1956).

Markham, Merger Policy Under the New Section 7: A Six Year Appraisal, 43 Va. L. Rev. 489 (1957).

Stocking & Mueller, The Cellophane Case, 45 Am. Econ. Rev. 29 (1955).

II. Work by Lawyers

A. Books

Brewster, Antitrust and American Business Abroad (1958).

Kaysen & Turner, Antitrust Policy (1959).

Schwartz, Free Enterprise and Economic Organization (2nd ed. 1959).

B. Articles

Bork, Ancillary Restraints and the Sherman Act, 15 A.B.A. Antitrust Section Rep. 211 (1959).

Cox, Labor and the Antitrust Laws - A Preliminary Analysis, 104 U. Pa. L. Rev. 252 (1955).

Fulda, Antitrust Considerations in Motor Carrier Mergers, 56 Mich. L. Rev. 1237 (1958).

Kessler, Automobile Dealer Franchises: Vertical Integration by Contract, 66 Yale L. J. 1135 (1957).

Kessler & Stern, Competition, Contract, and Vertical Integration, 69 Yale L. J. 1 (1959).

Levi, The Antitrust Laws and Monopoly, 14 U. Chi. L. Rev. 153 (1947).

Levi, The Robinson-Patman Act - Is It In The Public Interest?, 1952 A.B.A. Antitrust Section 60.

Lovell, Sales Below Cost Prohibitions: Private Price Fixing Under State Law, 57 Yale L. J. 391 (1948).

McAllister, The Big Case: Procedural Problems in Antitrust Litigation, 64 Harv. L. Rev. 27 (1950).

Neal, The Clayton Act and the Transamerica Case, 5 Stan. L. Rev. 179 (1953).

Rahl, Antitrust Policy in Distribution, 104 U. Pa. L. Rev. 185 (1955).

Rahl, Conspiracy and the Antitrust Laws, 44 Ill. L. Rev. 743 (1950).

Rahl, Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case, 45 Va. L. Rev. 1165 (1959).

Rahl, Resale Price Maintenance, State Action, and Antitrust Laws: Effect of Schwegmann Bros. v. Calvert Distillers Corp., 46 Ill. L. Rev. 349 (1951).

Rifkind, Division of Territory Under the Antitrust Laws, 1953 Antitrust L. Sym. 173.

Rostow, The New Sherman Act: A Positive Instrument of Progress, 14 U. Chi. L. Rev. 567 (1947).

Rowe, Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act, 66 Yale L. J. 1 (1956).

Rowe, Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman, 60 Yale L. J. 929 (1951).

Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv. L. Rev. 436 (1954).

Turner, Antitrust Policy and the Cellophane Case, 70 Harv. L. Rev. 281 (1956).

Turner, Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L. Rev. 50 (1958).

C. Student Work

Chicago:

Medical Societies and Medical Service Plans - From the Law of Associations to the Law of Antitrust, 22 U. Chi. L. Rev. 694 (1955).

The Per Se Illegality of Price-Fixing - Sans Power, Purpose or Effect, 19 U. Chi. L. Rev. 837 (1952).

Columbia:

The Nature of a Sherman Act Conspiracy, 54 Colum. L. Rev. 1108 (1954).

Regulated Industries and the Antitrust Laws; Substantive and Procedural Coordination, 58 Colum. L. Rev. 673 (1958).

Pennsylvania:

Antitrust Problems Raised by Private Regulation of the Auctioning of Leaf Tobacco, 106 U. Pa. L. Rev. 568 (1958).

Rules of Independent Insurance Agents Associations Under the Sherman Act, 105 U. Pa. L. Rev. 977 (1957).

Standards Governing Relief Under Section 4 of the Sherman Act, 97 U. Pa. L. Rev. 234 (1948).

Yale:

The Enforcement of Resale Price Maintenance, 69 Yale L. J. 168 (1959).

The "New" Federal Trade Commission and the Enforcement of the Antitrust Laws, 65 Yale L. J. 34 (1955).

Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit, 61 Yale L. J. 1010 (1952).

Local Monopoly in the Daily Newspaper Industry, 61 Yale L. J. 948 (1952).

Price Systems and Competition: The Basing Point Issues, 58 Yale L. J. 426 (1949).

1. Rahl, Book Review, 3 J. Leg. Ed. 654 (1951).

2. Kaysen and Turner, Antitrust Policy 14 (1959).

3. The Sherman Act "as a charter of freedom . . . has a generality and adaptability comparable to that found to be desirable in constitutional provisions." Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359 (1933).

4. United States v. United Shoe Machinery Co., 110 F. Supp. 295, 348 (D.C. Mass. 1953).

5. Report of the Attorney General's National Committee to Study the Antitrust Laws 2 (1955).

6. This paper does not include consideration of the substantial research output of Congressional committees.

7. Oppenheim, Federal Antitrust Laws, Cases and Comments (2nd ed. 1959).

8. See Packer, Book Review, 67 Yale L. J. 1141, 1147 (1958).

1. Standard Oil Co. v. United States, 211 U.S. 1 (1911).

2. Id. at 58.

3. United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

4. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

5. Chicago Board of Trade v. United States, 246 U.S. 231 (1918).

6. Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933).

7. Compare American Column & Lumber Co. v. United States, 257 U.S. 377 (1921) with Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925).

8. Standard Oil Co. (Indiana) v. United States, 283 U.S. 163 (1931).

9. Eastern States Retail Lumber Ass'n v. United States, 234 U.S. 600 (1914).

10. Fashion Originators' Guild of America, Inc., v. Federal Trade Commission, 312 U.S. 457 (1941).

11. Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

12. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

13. United States v. Colgate & Co., 250 U.S. 300 (1919).

14. Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441 (1922).

15. United States v. General Electric Co., 272 U.S. 476 (1926).

16. 50 Stat. 693 (1937).

17. Henry v. A.B. Dick Co., 224 U.S. 1 (1912).

18. Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917).

19. See, e.g., Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922).

20. 221 U.S. 1 (1911).

21. 221 U.S. 106 (1911).

22. United States v. U.S. Steel Corp., 251 U.S. 417 (1920).

23. United States v. United Shoe Machinery Co., 247 U.S. 32 (1918).

24. United States v. International Harvester Co., 274 U.S. 693 (1927).

25. See, e.g., Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1920).

26. Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).

27. United States v. Hutcheson, 312 U.S. 219 (1941).

28. Allen-Bradey Co. v. Local No. 3, 325 U.S. 797 (1945).

29. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

30. See Arnold, Antitrust Law Enforcement, Past and Future, 7 Law and Contemporary Problems 5, 16-17, 22 (1940).

31. Gray, The Merger Case, 17 Harv. L. Rev. 474 (1904); Langdell, The Northern Securities Case and The Sherman Antitrust Act, 16 Harv. L. Rev. 539 (1903). Cf. McLaughlin's comment: "Professors Langdell and Gray quite failed to grasp the situation." Cases on the Federal Antitrust Laws 40 n. 123 (1930).

32. Walker, History of the Sherman Law 312 (1910).

33. F. D. Jones, Historical Development of the Law of Business Competition, 35 Yale L. J. 905; 36 Yale L. J. 42, 207, 351 (1926-27).

34. Adler, Monopolizing at Common Law, 31 Harv. L. Rev. 246 (1917).

35. Peppin, Price Fixing Agreements Under the Sherman Antitrust Law, 28 Calif. L. Rev. 297, 677 (1940).

36. Kales, Contracts and Combinations in Restraint of Trade (1918). Cf. McLaughlin, Cases on the Federal Antitrust Laws 268 (1930).

37. E. Jones, The Trust Problem (1921).

38. Watkins, Industrial Combinations and Public Policy (1927).

39. 35 Harv. L. Rev. 815, 926 (1922).

40. 30 Harv. L. Rev. 830 (1917).

41. 32 Colum. L. Rev. 179 (1932).

42. 26 Colum. L. Rev. 381 (1926).

43. 45 Yale L. J. 1339, 46 Yale L. J. 228 (1936).

44. 17 Colum. L. Rev. 663 (1917).

45. Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917).

46. 41 Harv. L. Rev. 946 (1928).

47. 46 Harv. L. Rev. 885 (1931).

48. 7 Law and Contemporary Problems 1-160 (1940).

49. Cavers, Labor v. The Sherman Act, 8 U. Chi. L. Rev. 246 (1941); Gregory, The Sherman Act v. Labor, 88 U. Chi. L. Rev. 222 (1941).

1. Chamberlin, The Theory of Monopolistic Competition (Harvard Economic Studies) (1st ed. 1933) (7th ed. 1956).

2. Id. ch. III.

3. Id. chs. IV & V.

4. See Bibliography on Monopolistic Competition in Chamberlin, The Theory of Monopolistic Competition 277 (7th ed. 1956) (containing 1497 items). See also Triffin, Monopolistic Competition and General Equilibrium Theory vii-viii (Harvard Economic Studies, 5th printing 1946) and Fellner, Competition Among the Few - Oligopoly and Similar Market Structures 40 & 51 (1st ed. 1949) for indications of the influence of Chamberlin's theory.

5. Marcus, Antitrust Bugbears: Substitute Products - Oligopoly, 105 U. Pa. L. Rev. 185 (1960).

6. Mason, Economic Concentration and the Monopoly Problem 380-81 (Harvard Economic Studies, 1957).

7. J. Clark, Toward a Concept of Workable Competition, 30 Am. Econ. Rev. 243 (1940).

8. See Selected Bibliography on Concept of Workable Competition and Antitrust Issues, in Oppenheim, Federal Antitrust Laws, 296 (2d. ed. 1959).

9. "An industry is workably competitive when (1) there are a considerable number of firms selling closely related products in each important market area, (2) these firms are not in collusion, and (3) the long-run average cost curve for a new firm is not materially higher than that for an established firm." Stigler, Extent and Bases of Monopoly, 32 Am. Econ. Rev. 2-3 (Supp. 1942).

10. "Corwin Edwards has developed the idea of workable competition in greatest detail. In addition to numbers of sellers and buyers, absence of collusion and freedom of entry, he states a number of other conditions of which absence of a dominant trader among the number of buyers and sellers seems to be the most important." Mason, Economic Concentration and the Monopoly Problem 354 n.7 (1957), citing Edwards, Maintaining Competition 9-10 (1949). See also Edwards, Big Business and the Policy of Competition 2-3 (1956).

11. Kaplan, Big Enterprise in a Competitive System ch. II (1954).

12. Griffin, An Economic Approach to Antitrust Problems, (American Enterprise Association 1951).

13. Stocking, The Rule of Reason, Workable Competition and Monopoly, 64 Yale L. J. 1107 (1955).

14. Adams, The "Rule of Reason": Workable Competition or Workable Monopoly, 63 Yale L. J. 348 (1954).

15. See essays collected in Mason, Economic Concentration and the Monopoly Problem, (Harvard Economic Studies, 1957).

16. Books: A & P: A Study in Price-Cost Behavior and Public Policy (Harvard Economic Studies, 1959). Articles: Geographical Price Differentials: An Economic Commentary, 48 Ill. B. J. 514 (1960); Small Business - A Matter of Definition, 16 A.B.A. Antitrust Section Rep. 18 (1960); Comment on Pricing Objectives in Large Companies, 49 Am. Econ. Rev. 669 (1959); Economic Aspects of the Bethlehem Opinion, 45 Va. L. Rev. 684 (1959); Du Pont-General Motors Decision, 43 Va. L. Rev. 873 (1957); The 'Product' and 'Price' in Distribution, 47 Am. Econ. Rev. 266 (papers and proceedings, 1957); General Comment on the Schwartz Dissent, 1 Antitrust Bull. 71 (1955); Price Discrimination as Treated in the Attorney General's Report, 104 U. Pa. L. Rev. 22 (1955); Corporate Integration, in How to Comply With the Antitrust Laws 290 (Van Cise & Dunn, eds. 1954); Discussion on Fundamental Characteristics of the American Economy, 44 Am. Econ. Rev. 32 (1954); Integration and Dissolution of the A & P Company - A Reply, 29 Ind. L. J. 367 (1954); A Note on Corporate Concentration and Turnover, 44 Am. Econ. Rev. 392 (1954) Symposium Review: Galbraith's "Concept of Countervailing Power" and Lilienthal's "Big Business" 49 Nw. U. L. Rev. 139 (1954) (with Nourse, Levi, Siefkin, Goldberg, O'Mahoney & Berge); "Acquire the Whole or Any Part of the Stock or Assets of Another Corporation, 1953 A.B.A. Antitrust Section Rep. 111 (Annual Meeting), also in An Antitrust Handbook 195 (A.B.A. Section of Antitrust Law, 1958); The Consistency of the Robinson-Patman Act, 6 Stan. L. Rev. 3 (1953); Integration and the Outlook for the Future, 1951 Antitrust L. Sym. 135; The A & P Case: A Study in Applied Economic Theory, 63 Q.J. Econ. 238 (1949); The Great A & P Muddle, Fortune, Dec. 1949; Integration and Antitrust Policy, 63 Harv. L. Rev. 27 (1949); Effective Competition and the Antitrust Laws, 61 Harv. L. Rev. 1289 (1948). Book Reviews: Edwards, Big Business and the Policy of Competition, 52 Nw. U. L. Rev. 431 (1957); Mason, Economic Concentration and the Monopoly Problem, 43 Va. L. Rev. 1195 (1957); Machlup,

Basing Point System, 2 Stan. L. Rev. 242 (1949). To complete bibliography see note 40, infra.

17. Books: Antitrust Policy (1959) (with Turner); United States v. United Shoe Machinery Corporation (Harvard Economic Studies, 1956). Articles: An Economist as the Judge's Law Clerk in Sherman Act Cases, 12 A.B.A. Antitrust Section Rep. 43 (1958); Special Session Devoted to Discussion of Current Issues, 2 Pat., T.M. & Cpyrt. J. Res. & Ed. 79 (Supp. 1958) (with Green, Kenyon, Crews & Rabinow); United States v. DuPont (General Motors), 21 Modern L. Rev. 189 (1958); The Social Significance of the Modern Corporation, 47 Am. Econ. Rev. 311 (1957). Book Reviews: Antitrust Laws: A Comparative Symposium, 70 Harv. L. Rev. 750 (1957).

18. See e.g., Oppenheim, Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy, 50 Mich. L. Rev. 1139, 1189, & n.134 (1952), citing Mason, The Current Status of the Monopoly Problem in the United States, 62 Harv. L. Rev. 1265 (1949) and Mason, Workable Competition Versus Workable Monopoly, 1951 Antitrust L. Sym. 67.

19. Mason, Market Power and Business Conduct: Some Comments on Report of the Attorney General's Committee on Antitrust Policy, 46 Am. Econ. Rev. 471, 478 (Papers and Proceedings, 1956).

20. Markham, An Alternative Approach to the Concept of Workable Competition, 40 Am. Econ. Rev. 349, 361 (1950).

21. Smith, Effective Competition: Hypothesis for Modernizing the Antitrust Laws, 26 N.Y. U. L. Rev. 405 (1951).

22. Oppenheim, Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy, 50 Mich. L. Rev. 1139, 1144 (1952).

23. Smith, Effective Competition: Hypothesis for Modernizing the Antitrust Laws, 26 N.Y. U. L. Rev. 405, 441 (1951).

24. Oppenheim, Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy, 50 Mich. L. Rev. 1139, 1187 (1952).

25. Kaysen & Turner, Antitrust Policy 81-82 (1959).

26. Edwards, Maintaining Competition (1949); Id., Big Business and the Policy of Competition (1956).

27. Stocking & Watkins, Monopoly and Free Enterprise (1951).

28. Dirlam & Kahn, Fair Competition: The Law and Economics of Antitrust Policy (1954).

29. Kaysen, United States v. United Shoe Machinery Corporation 334 (1956).

30. D. Wallace, Market Control in the Aluminum Industry, (Harvard Economic Studies 1937).

31. Bain, The Economics of the Pacific Coast Petroleum Industry (Part I, 1944; Part II, 1945; Part III, 1947).

32. See, especially, D. Wallace, Market Control in the Aluminum Industry ch. 15 (Harvard Economic Studies 1937).

33. Nicholls, Price Policies in the Cigarette Industry - A Study of "Concerted Action" and Its Social Control, 1911-50, at ch. XXVI & 396-7 (1951).

34. Kaysen, United States v. United Shoe Machinery Corporation (Harvard Economic Studies 1956).

35. See, especially, the discussion in Chapter X entitled "Some Reflections on the Standards and Administration of the Antitrust Laws."

36. McKie, Tin Cans and Tin Plate (1959).

37. Id. at ch. XI, particularly pp. 278, 286, 307 & 309-10.

38. Adelman, A & P - A Study in Price-Cost Behavior and Public Policy (Harvard Economic Studies 1959).

39. References are collected in Oppenheim, Federal Antitrust Laws, 430 n. 95 (2d ed. 1959).

40. W. Adams, The Structure of American Industry (rev. ed. 1954).

41. Whitney, Antitrust Policies - American Experience in Twenty Industries (1948).

42. Bain, Barriers to New Competition (1956).

43. See the four closely related debates in Volumes 32-34 of the Review of Economics and Statistics:

(1) Adelman, The Measurement of Industrial Concentration, 33 Rev. Econ. & Stat. 269 (1951); Four Comments on "The Measurement of Industrial Concentration": With a Rejoinder by Professor Adelman, 34 Rev. Econ. & Stat. 156 (1952) (Edwards, at 156; Stocking, at 161; George, at 168; Berle, at 172; Rejoinder, at 174).

(2) Adelman, supra, at 269; Blair, "The Measurement of Industrial Concentration": A Reply, 34 Rev. Econ. & Stat. 343; Adelman, Rejoinder, 34 Rev. Econ. & Stat. 346 (1952).

(3) Lintner & Butters, Effects of Mergers on Industrial Concentration: 1940-47, 32 Rev. Econ. & Stat. 30 (1950); Blair & Houghton, The Lintner-Butters Analysis of the Effects of Mergers on Industrial Concentration, 1940-47: A Reply, 33 Rev. Econ. & Stat. 63 (1951); Lintner & Butters, Rejoinder to Drs. Blair & Houghton, 33 Rev. Econ. & Stat. 67 (1951); Lintner & Butters, Further Rejoinder, 34 Rev. Econ. & Stat. 364 (1952); (rejoinder to Blair's objections to Lintner & Butters' Effects of Merger on Industrial Concentration which were raised by Blair in his Reply to Adelman's The Measurement of Industrial Concentration).

(4) Lintner & Butters, supra, at 30; Weston, Comment on Lintner-Butters Analysis, 33 Rev. Econ. & Stat. 71 (1951); Lintner & Butters, Rejoinder to Dr. Weston, 33 Rev. Econ. & Stat. 73 (1951).

44. Butters, Lintner & Cary, Effects of Taxation on Corporate Mergers (Harvard Business School 1951).

45. See the reviews of the literature in Business Concentration and Price Policy (A Conference of the Universities - National Bureau Committee for Economic Research, 1955).

46. Edwards, Conglomerate Bigness as a Source of Power, in Business Concentration and Price Policy (A Conference of the Universities - National Bureau Committee for Economic Research, 1955).

47. Shubik, Strategy and Market Structure - Competition, Monopoly and the Theory of Games (1959).

48. Latham, The Group Basis of Politics - A Study in Basing Point Legislation (1952). See also the debate about the Cement case: Latham, Giantism and Basing Points: A Political Analysis, 58 Yale L. J. 383 (1949); McAllister & Quigg, The Art of Selecting and Exploiting Half Truths: A Reply to

"Giantism and Basing Points", 58 Yale L. J. 1068 (1949); Latham, Lament for Cement: Being an Answer to a Reply, 58 Yale L. J. 1079 (1949); McAllister & Quigg, Rejoinder by Messrs. McAllister and Quigg, 58 Yale L. J. 1090 (1949).

49. See, e.g., Kaysen, The Corporation: How Much Power? What Scope?, in The Corporation in Modern Society 85 (Mason ed., 1959); cf. Rostow, To Whom and for What Ends are Corporate Managements Responsible?, in id. at 46.

1. Toulmin, A Treatise on the Antitrust Law of the United States and Including All Related Trade Regulatory Laws (1949).

2. Van Cise, Understanding the Antitrust Laws (Practicing Law Institute, Feb. 1958 ed.).

3. ABA Section of Antitrust Law, An Antitrust Handbook (1958). The better articles include: Adelman, Acquire the Whole or any Part of the Stock or Assets of Another Corporation, at p. 195; McAllister, Where the Effect May Be to Substantially Lessen Competition or Tend to Create a Monopoly, at p. 209; Howrey, Federal Trade Commission Decisions, at p. 361; Markham, Economic Analysis, at p. 373; Day, Trial, at p. 469.

4. How to Comply with the Antitrust Laws Including the 1954 Antitrust Law Symposium (Van Cise & Dunn eds. 1954) (papers delivered before N.Y.S.B.A. section on Antitrust Law). The better articles include: Rifkind, Division of Territories, at p. 127; Hodson, Exclusive Dealing, at p. 140; Correa, Discrimination in Prices, at p. 152; Schwartz, Control of Affiliates, at p. 234; Adelman, Corporate Integration, at p. 290; Rostow, Over-All Size, at p. 311, Austern, Dealing with Uncertainties, at p. 343.

5. Kronstein, Miller & Schwartz, Modern American Antitrust Law - A Guide to its Domestic and Foreign Application (1958).

6. Loevinger, The Law of Free Enterprise (1949).

7. Hale & Hale, Market Power: Size and Shape Under the Sherman Act (1958).

8. Kaysen & Turner, Antitrust Policy - An Economic and Legal Analysis (1959) (market structure surveys; antitrust policy applied to problems of size, merger, integration, business practices, per se rules, patents, and price discrimination; exemptions to antitrust law; administration and enforcement).

9. Brewster, Antitrust and American Business Abroad (1958); Fugate, Foreign Commerce and the Antitrust Laws (1958).

10. Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act (2d rev. ed. 1959).

11. Cost Justification of Price Differentials Under the Robinson-Patman Act, 59 Colum. L. Rev. 584 (1959);

Discriminatory Sales of Commodities in Commerce: Jurisdictional Criteria Under the Robinson-Patman Act, 67 Yale L. J. 1155 (1958); Evolution of the Robinson-Patman Act: A Twenty Year Perspective, 57 Colum. L. Rev. 1059 (1957); How to Comply with Sections 2(c) - 2(f), 1957 Antitrust L. Sym. 124; Price Differentials and Products Differentiation: The Issues Under Robinson-Patman Act, 66 Yale L. J. 1 (1956); Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman, 60 Yale L. J. 929 (1951).

12. Oppenheim, Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy, 50 Mich. L. Rev. 1139 (1952).

13. Rostow, Planning for Freedom - The Public Law of American Capitalism (1959) (ch. 11, pp. 272-316).

14. Rahl, Resale Price Maintenance, State Action and the Antitrust Laws: Effect of Schwegmann Brothers v. Calvert Distillers Corp., 46 Ill. L. Rev. 349 (1951).

15. Neal, The Clayton Act and the Transamerica Case, 5 Stan. L. Rev. 179 (1953).

16. Turner, Antitrust Policy and the Cellophane Case, 70 Harv. L. Rev. 281 (1956).

17. R. S. Brown, Readings on the Petroleum Industry (AALS Industry Study for Collateral Use in Courses in Antitrust Law, (1st rev. 1950); Bursler, The DuPont Industrial Group (AALS Industry Study, initial ed. 1951); Fulda, Food Distribution in the United States: The Struggle Between Independents and Chains, 99 U. Pa. L. Rev. 1051, also an AALS Industry Study, initial ed. 1951.

18. Since 1943, Derenberg's reviews have appeared in the Annual Survey of American Law from 1951-60 under the title, Trade Regulation, and from 1943-50 under two titles, The Antitrust Laws and Unfair Trade Practices. From 1953 the series has also been published in New York University Law Review under the title, Trade Regulation.

Other Articles: The Impact of Antitrust Laws on Trademarks in Foreign Commerce in Panel Discussion, 21 Geo. Wash. L. Rev. 663 (1953), 27 N.Y.U.L. Rev. 414, 42 Trademark Rep. 365 (1952).

19. Recent Developments in Antitrust Law: 1958-1959, 59 Colum. L. Rev. 843 (1959); Recent Antitrust Developments,

14 Record of N.Y.C.B.A. 318 (1959); Recent Antitrust Developments, 13 Record of N.Y.C.B.A. 417 (1958); Annual Review of Antitrust Developments, 2 Antitrust Bull., 12 Record of N.Y.C.B.A. 411 (1957); Annual Review, 11 Record of N.Y.C.B.A. 367 (1956); Review of Antitrust Developments in Trade Regulation Series #3 at 73 (Zaidins ed. 1956); Annual Review, 10 Record of N.Y.C.B.A. 332 (1955); Recent Antitrust Developments, 9 Record of N.Y.C.B.A. 171 (1954); See note 43 infra for remainder of bibliography.

20. Selected Developments in the Courts and the Federal Trade Commission, 15 A.B.A. Antitrust Section Rep. 37 (1959); Developments in Antitrust During the Past Year, 15 A.B.A. Antitrust Section Rep. 74 (1959) (joint project of Oppenheim, Anderson, Sprunk, Austin, Cutler, Decker, Levi, Ruddock, Austern, Hollabaugh with final text by Oppenheim); see note 44 infra for remainder of bibliography.

21. Developments in Antitrust During the Past Year, 13 A.B.A. Antitrust Section Rep. 117, 3 Antitrust Bull. 63 (1958); Developments in Antitrust Law During the Year Ending July 1956, 9 A.B.A. Antitrust Section Rep. 138 (1956), 38 Chi. B. Record 151 (1957); Developments in Antitrust During the Year Ending July 1955, 37 Chi. B. Record 157 (1956), 1955 A.B.A. Antitrust Section Rep. (August); Antitrust Developments During the Past Year, 36 Chi. B. Record 103 (1954); Territorial Price Differentials Under the Robinson-Patman Act, 41 Chi. B. Record 121, 5 Antitrust Bull. 187 (1959); Mergers and the New Section 7, 1958 Institute on Antitrust Law and Price Regulations 165 (presented by Southwestern Foundation); Antitrust Developments: May Mean a New Era for Competitive Pricing, 41 A.B.A.J. 113, 185 (1955); General Appraisal of the Robinson-Patman Act, in Trade Regulation Series #2 at 177 (Rahl & Zaidins eds. 1955); Robinson-Patman Act: Go Out and Compete But Don't Get Caught at it, 34 Chi. B. Record 447 (1953); Changing Legal Concepts in the Antitrust Field, 3 Syracuse L. Rev. 60, 32 Chi. B. Record 343 (1951); Save the Sherman Act from its "Friends", 1950 Institute on Antitrust Law and Price Regulations 211.

22. E.g., Trouble Begins in the "New" Sherman Act: The Perplexing Story of the A & P Case, 58 Yale L. J. 969 (1949); Price Systems and Competition: The Basing-Point Issues, 58 Yale L. J. 426 (1949).

23. E.g., Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit, 61 Yale L. J. 1010 (1952).

24. E.g., The Enforcement of Resale Price Maintenance, 69 Yale L. J. 168 (1959); The New Federal Trade Commission and the Enforcement of the Antitrust Laws, 65 Yale L. J. 34 (1955); Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit, 61 Yale L. J. 1010 (1952); Local Monopoly in the Daily Newspaper Industry, 61 Yale L. J. 948 (1952); Trouble Begins in the "New" Sherman Act: The Perplexing Story of the A & P Case, 58 Yale L. J. 969 (1949); Price Systems and Competition: The Basing-Point Issues, 58 Yale L. J. 426 (1949); Compulsory Patent Licensing by Antitrust Decree, 56 Yale L. J. 77 (1946).

25. E.g., Resale Price Maintenance by an Integrated Firm: The McKesson & Robbins Case, 24 U. Chi. L. Rev. 533 (1957); Medical Societies and Medical Service Plans - From the Law of Associations to the Law of Antitrust, 22 U. Chi. L. Rev. 694 (1955); The Per Se Illegality of Price-Fixing - Sans Power, Purpose or Effect, 19 U. Chi. L. Rev. 827 (1952); Trade Associations Statistics and the Antitrust Laws, 18 U. Chi. L. Rev. 380 (1951).

26. E.g., Antitrust Problems Raised by Private Regulation of the Auctioning of Leaf Tobacco, 106 U. Pa. L. Rev. 568 (1958); Rules of Independent Insurance Agents Associations Under the Sherman Act, 105 U. Pa. L. Rev. 977 (1957); Standards Governing Relief Under Section 4 of the Sherman Act, 97 U. Pa. L. Rev. 234 (1948); Judicial Regulation of the Motion Picture Industry: The Paramount Case, 95 U. Pa. L. Rev. 662 (1947).

27. E.g., The American Crystal Sugar and Bethlehem-Youngstown Decisions: Methodology and Standards Under Section 7 of Clayton Act, 58 Colum. L. Rev. 1269 (1958); Regulated Industries and the Antitrust Laws: Substantive and Procedural Coordination, 58 Colum. L. Rev. 673 (1958); The Nature of a Sherman Act Conspiracy, 54 Colum. L. Rev. 1108 (1954); The Market: A Concept in Antitrust, 54 Colum. L. Rev. 580 (1954).

28. E.g., Extraterritorial Application of the Antitrust Laws, 69 Harv. L. Rev. 1452 (1956); The Operation of Fair-Trade Programs, 69 Harv. L. Rev. 316 (1955); Functional Discounts Under the Robinson-Patman Act: The Standard Oil Litigation, 67 Harv. L. Rev. 294 (1953).

29. Brown, Review of Machlup, The Basing Point System, 58 Yale L. J. 1199 (1949); Levi, Review of Oppenheim, Cases on the Federal Antitrust Laws, 1 J. Leg. Ed. 139 (1948);

McAllister, Review of Handler, Antitrust in Perspective, 11 J. Leg. Ed. 119 (1958); Neal, Review of Kaysen, United States v. United Shoe Machinery Company, 70 Harv. L. Rev. 1505 (1957); Rahl, Review of Rostow, A National Policy for the Oil Industry, 43 Ill. L. Rev. 421 (1949); Schwartz, Review of Toulmin, A Treatise on the Antitrust Laws, 98 U. Pa. L. Rev. 951 (1950).

30. E.g., Adelman, A & P - A Study in Price-Cost Behavior and Public Policy (Harvard Economic Studies 1959); Kaysen, United States v. United Shoe Machinery Corporation - An Economic Analysis of an Antitrust Case (Harv. Econ. Studies 1956); Stocking & Mueller, The Cellophane Case and the New Competition, 45 Am. Econ. Rev. 29 (1955); Nicholls, Price Policies in the Cigarette Industry - A Study of "Concerted Action" and Its Social Control, 1911-50 (1951); Tennant, The American Cigarette Industry - A Study in Economic Analysis and Public Policy (1950); Stocking, The DuPont-General Motors Case and the Sherman Act, 44 Va. L. Rev. 1 (1958).

31. See e.g., Brewster, Antitrust and American Business Abroad vii-viii & 255-57 (1958). Of course economists have been using this technique for years. For recent examples see, e.g., Edwards, The Price Discrimination Law, ix (1959); Whitney, Antitrust Policies - American Experience in Twenty Industries ix (1958).

32. E.g., Markham, Merger Policy Under the New Section 7: A Six-Year Appraisal, 43 Va. L. Rev. 489 (1957); Comment, A Re-Analysis of Consent Decrees, 55 Mich. L. Rev. 92 (1956); Comment, The "New" Federal Trade Commission and the Enforcement of the Antitrust Laws, 65 Yale L. J. 34 (1955); Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit, 61 Yale L. J. 1010 (1952); Timberg, Equitable Relief Under the Sherman Act, 1950 U. Ill. L.F. 629.

33. For an extreme example, see 63 Yale L. J. No. 3 (pp. 293-444): Kahn, A Legal and Economic Appraisal of the "New" Sherman and Clayton Acts, pp. 293-347; Adams, The "Rule of Reason" Workable Competition or Workable Monopoly?, pp. 348-370; Comment, Intra-Enterprise Conspiracy Under the Sherman Act, pp. 372-388; Note, Definition of the Market in Tying Arrangements: Another Aspect of Times-Picayune, pp. 389-398; Note, The Investment Bankers Case: The Use of Semantics to Avoid the Per Se Illegality of Price Fixing, pp. 399-407.

34. ABA Section of Antitrust Law, Proceedings (published from 1952); Antitrust Bulletin (from April 1955); CCH Antitrust Law Symposium on Robinson-Patman Act (1946, 1947, & 1948) (papers delivered before special meeting of N.Y.S. B.A. Section of Food, Drug & Cosmetic Law); Institute on Antitrust Laws and Price Regulations (from 1950) (presented by Southwestern Legal Foundation); NYSBA Section on Antitrust Law, Symposium (from 1949) (published by CCH); Trade Regulation Series, Symposium (N.Y. Fed. Legal Publications, publs.) (#1, 1955; #2, 1955; #3, 1956).

35. Att'y Gen. Nat'l. Comm. Antitrust Rep. (1955).

36. Oppenheim, Federal Antitrust Laws 60 n. 158 (2d ed. 1959). Particularly good pieces include: Brewster, Enforceable Competition, 46 Am. Econ. Rev. 482 (1956); Rostow, Report of the Attorney General's Committee in Perspective, 1956 Antitrust L. Sym. 64; Cox, Labor and the Antitrust Laws - A Preliminary Analysis, 104 U. Pa. L. Rev. 252 (1955); Rahl, Antitrust Policy in Distribution, 104 U. Pa. L. Rev. 185 (1955).

37. Bain, Barriers to New Competition (Harvard University Series on Competition in American Industry No. 3, 1956); Cookenboo, Crude Oil Pipe Lines and Competition in the Oil Industry (Harv. Series No. 2, 1955); Kaysen & Turner, Antitrust Policy, (Harv. Series No. 7, 1959); Loescher, Imperfect Collusion in the Cement Industry (Harv. Series No. 4, 1959); Markham, Competition in the Rayon Industry (Harv. Series No. 1, 1952); McKie, Tin Cans and Tin Plate (Harv. Series No. 5, 1959); M. Peck, Forthcoming Study of Aluminum Industry.

38. Morris Adelman, Joe Bain, Robert Bishop, Robert Bowie, Kingman Brewster, David Cavers, Kermit Gordon, Lincoln Gordon, Carl Kaysen, John Lintner, Edward Mason (chairman), Albert Sacks, Donald Trautman, Donald Turner.

39. Brewster, Antitrust and American Business Abroad (1958); Kaysen, United States v. United Shoe Machinery Corporation - An Economic Analysis of an Anti-Trust Case (1956).

40. Bork, Vertical Integration and the Sherman Act: The History of an Economic Misconception, 22 U. Chi. L. Rev. 157 (1954); Bowman, The Prerequisites and Effects of Resale Price Maintenance, 22 U. Chi. L. Rev. 825 (1955); Jewkes, Sawyers & Stillerman, The Sources of Invention (1958); Letwin, Congress and the Sherman Antitrust Act: 1887-1890, 23 U. Chi. L. Rev. 221 (1956); Letwin, English Common Law

Concerning Monopolies (1954); McGee, Price Discrimination and Competitive Effects: The Standard Oil of Indiana Case, 23 U. Chi. L. Rev. 398 (1956); Nutter, The Extent of Enterprise Monopoly in the United States, 1899-1939 (1951); Weston, The Role of Mergers in the Growth of Large Firms (1953); Levi, The Monopoly Problem as Viewed by a Lawyer, 47 Am. Econ. Rev. 293 (1957); Levi & Director, Trade Regulation, 51 Nw. U. L. Rev. 281 (1956).

41. Levi & Director, Law and the Future: Trade Regulation, 51 Nw. U. L. Rev. 281 (1956):

"The doctrine of abuses sees them as exclusionary devices useful for getting a monopoly, or expanding it, or for moving from one monopoly to the creation of another. Thus when vertical integration is concerned, the inquiry is often as to the "leverage" of the device. When a tying clause is annexed to a patent, the courts regard this as an attempt to create a new monopoly using the leverage of the patent monopoly. . . . Since the firms have not achieved positions which are regarded as illegal in themselves, it becomes important to see if their conduct threatens to bring to them greater monopoly power. . . .

We are not sure of the basis or the justification for the concept of abuses. . . .

The economic teaching gives little support to the idea that the abuses create or extend monopoly. Firms that are competitive cannot impose coercive restrictions on their suppliers or their customers as a means of obtaining a monopoly. They lack the power to do this effectively. Firms which have some monopoly power over prices and output can impose coercive restrictions on suppliers and customers. In the normal case, however, they will lose revenue if they do impose such restrictions, and this casts some doubt on how prevalent or continued the practice would be. Such firms would lose revenue because they cannot both obtain the advantage of the original power and impose additional coercive restrictions so as to increase their monopoly power. The coercive restrictions on customers are possible only if the price which would be charged without the reduction is reduced. . . . In point of fact even a firm with complete monopoly power over prices and output cannot both get the advantage of such power and impose additional coercive restrictions on suppliers and customers. At most such a firm, and of course one with only some monopoly power, can decide to impose additional costs upon itself for the sake of a restriction. Such a restriction might be valuable if the effect of it would be to impose greater

costs on possible competitors. But except for this special case, there is no clearly apparent advantage to a firm with monopoly power as against one without such power. . . ."

42. The following articles, discussions and addresses have been published in Patent, Trademark, and Copyright Journal of Research and Education (P, TM & C J.) as part of Project 4a, Effect of Certain Antitrust Decrees Involving Patents as a Major Factor: Frost, Oppenheim & Twomey, Compulsory Licensing and Patent Dedication Provisions of Antitrust Decrees - A Foundation for Detailed Factual Case Studies, 1 P, TM & C J. 127 (1957); Presentation of Interim Report on Concrete Block, 1 P, TM & C J. 17 (Conf. Suppl. 1957); Frost, Oppenheim & Twomey, The Concrete Block Making Machine Industry, 2 P, TM & C J. 61 (1958); Presentation of Interim Report on Parking Meters, 2 P, TM & C J. 66 (Conf. Suppl. 1958); Frost, Oppenheim & Twomey, The Parking Meter Industry, 2 P, TM & C J. 376 (1958); Presentation of Interim Report on Color Movies, 3 P, TM & C J. 61 (Conf. No. 1959); Frost & Oppenheim, A Study of the Professional Color Motion Picture Antitrust Decrees and Their Effects, 4 P, TM & C J. 1, 108 (1960).

43. Books: Antitrust in Perspective - The Complementary Roles of Rule and Discretion (1957). Articles: Introductory - The Brandeis Conception of the Relationship of Small Business to Antitrust, 16 A.B.A. Antitrust Section Rep. 13 (1960); Discussion on Current Anti-Trust Problems, 15 A.B.A. Antitrust Section Rep. 318 (1959) (with Austern & McAllister); Proposals for Changing the Law of New York on Unfair Competition and False Advertising, 1959 Antitrust L. Sym. 169; Varieties Approach to the Problem of Competition, 5 McGill L. J. 209 (1959); The Aftermath of the DuPont-General Motors Case, 1948 Antitrust Law Sym. 109 (1958); Contract, Combination or Conspiracy, in An Antitrust Handbook, 119 (ABA Section of Antitrust Law 1958); Development of the Rule of Reason, 10 A.B.A. Antitrust Section Rep. 21 (1957); Quantitative Substantiality and the Celler-Kefauver Act, A Look at the Record, 7 Mercer L. Rev. 279 (1956), 1956 Antitrust L. Sym. 14; An Examination of the Chapter on Patent Antitrust Problems, in Attorney General's Committee Report in Symposium, 1 Antitrust Bull., 156 (1955); Monopolies, Mergers and Markets - A New Focus, in Trade Regulation Series #1 (Federal Leg. Publ., 1955); Antitrust - New Frontiers and New Perplexities, 6 Record of N.Y.C.B.A. 59 (1951); Trade-marks and Antitrust Laws, 38 Trademark Rep. 387 (1948). For remainder of bibliography, see Note 19 supra.

44. Books: Federal Antitrust Laws Cases and Comments (2d ed. 1959); Cases on Federal Antitrust Laws, (1949 Suppl.); Price and Service Discriminations Under the Robinson-Patman Act, A Syllabus (1949); Cases on Unfair Competition (1948); The National Transportation Policy and Inter-Carrier Competitive Rates, Legislative History and Legal Interpretation (1945). Articles: Guide Note for Study of the American Patent System and Commentary, 2 Pat., T.M. & Cpyrt. J. Res. & Ed. 520 (1958); Introductory Statements to a Round Table Discussion of How to Comply with the Sherman Act, 1958 Antitrust L. Sym. 3; Judicial Process in Unfair Competition Law: A Perspective and a Focus, 2 Pat., T.M. & Cpyrt. J. Res. & Ed. 116 (1958); Antitrust Problems (Patents), in Trade Regulation Series #2, 9 & 95, (Rahl & Zaidins eds. 1955); Highlights of the Final Report of the Attorney General's National Committee to Study the Antitrust Laws, 1 Antitrust Bull. 6 (1955); Patents and Antitrust; Peaceful Coexistence?, 54 Mich. L. Rev. 199 (1955); Remarks on the Report of the Committee, in Trade Regulation Series #2 at 9 (Rahl & Zaidins eds. 1955); Attorney General's National Committee; Program and Process, in How to Comply with the Antitrust Laws, 93 (Van Cise & Dunn eds. 1954), Remarks, 1954, A.B.A. Antitrust Section Rep. 28 (Annual Meeting): Needed Revisions in National Antitrust Policy, 1953 Antitrust L. Sym. 70; Opening Remarks to Panel Meeting on Impact of the Antitrust Laws on Patents and Trademarks in Foreign Commerce, 21 Geo. Wash. L. Rev. 663 (1953); Organization of the Attorney General's National Committee to Study the Antitrust Laws, 1953 Antitrust L. Sym. 20; Foreign Commerce Under the Sherman Act - Points and Implications of the Timken Case, 42 Trademark Rep. 3 (1952); New Approach to Evaluation of the American Patent System, 33 J. Pat. Off. Soc'y 555 (1951); Antitrust Enforcement Trends, 17 J. of B.A.D.C. 111 (1950); Economic Background for Symposium on Divestiture as a Remedy Under Federal Antitrust Laws, 19 Geo. Wash. L. Rev. 119 (1950); A New Look at Enforcement Trends, 1950 Antitrust L. Sym. 69; Public Interest in Legal Protection of Industrial and Intellectual Property, 32 J. Pat. Off. Soc'y 903, 40 Trademark Rep. 613 (1950); Should the Robinson-Patman Act Be Amended?, CCH Symposium on Robinson-Patman Act 141 (1948). Book Reviews: Handler, Antitrust in Perspective: The Complementary Roles of Rule and Discretion, 58 Colum. L. Rev. 1100 (1958); Callman, Law of Unfair Competition and Trademarks, 15 Geo. Wash. L. Rev. 116 (1946). To complete bibliography see notes 12 & 20 supra.

45. Articles: Developments in Antitrust During the Past Year, 15 A.B.A. Antitrust Section Rep. 74 (1959) (Joint

project of Oppenheim, Anderson, Spruck, Austin, Cutler, Decker, Levi, Ruddock, Austern, Hollabaugh with final text by Oppenheim); Section 7 of the Clayton Act and the Regulated Industries, 1959 Antitrust L. Sym. 136; The DuPont Case and Section 7 of the Clayton Act, 3 Antitrust Bull. (1958); The Monopoly Problem as Viewed by a Lawyer, 6 U. Chi. L. S. Record 10, 47 Am. Econ. Rev. 293 (papers and proceedings 1957); Analysis of Chapter IV: Antitrust Policy in Distribution, in Symposium on Report of Attorney General to Study the Antitrust Laws, 1955 A.B.A. Antitrust Section Rep. 85 (Annual Meeting); Mergers, in Trade Regulation Series #2 at 69 (Rahl & Zaidins eds. 1955). Reviews: Galbraith's "Concept of Countervailing Power" and Lilienthal "Big Business" 49 Nw. U. L. Rev. 139 (1954) (with Nourse, Adelman, Siefkin, Goldberg, O'Mahoney & Berg); Two Level Anti-Monopoly Law, 47 Nw. U. L. Rev. 567 (1952); The Robinson-Patman Act - Is It in the Public Interest?, 1952 A.B.A. Antitrust Section 60; Antitrust Laws and Monopoly, 14 U. Chi. L. Rev. 153 (1947). Book Reviews: Hale & Hale, Market Power, 28 Rev. Jur. U.P.R. 333, 26 U. Chi. L. Rev. 672 (1959); Oppenheim, Federal Antitrust Laws, 1 J. Legal Ed. 139 (1948).

46. Books: A National Policy for the Oil Industry (1948). Articles: Introductory Remarks to Round Table Discussion of How to Comply With Clayton Act, 1959 Antitrust L. Sym. 71; Report of the Attorney General's Committee in Perspective, 1956 Antitrust L. Sym. 64; Over-All Size, in How to Comply With the Antitrust Laws 311 (Van Cise & Dunn eds. 1954); Entry Into the Oil Refining Business: Vertical Integration Reexamined, 61 Yale L. J. 856 (1952); Problems of Size and Integration, 1951 Antitrust L. Sym. 158; Monopoly Under the Sherman Act - Power or Purpose?, 43 Ill. L. Rev. 745 (1945); A Reply to Bain's Article on Rostow's Proposals for Petroleum Policy, 57 J. Pol. Econ. 60 (1949); The New Sherman Act: A Positive Instrument of Progress, 14 U. Chi. L. Rev. 567 (1947). Book Reviews: Baker, Directors and Their Functions: A Preliminary Study, 6 Law Guild Rev. 602 (1946); Lynch, Concentration of Economic Power, 14 U. Chi. L. Rev. 533 (1947). To complete bibliography see note 13 supra.

47. Books: Free Enterprise and Economic Organization - Legal and Related Materials (1952) (2d ed. 1959). Articles: Institutional Size and Individual Liberty: Authoritarian Aspects of Bigness, 55 Nw. L. Rev. 4 (1960); Administered Prices, Oligopoly and the Sherman Act, 12 A.B.A. Antitrust Section Rep. 17 (1958); Committees, Politics, Scholarship and Law Reform: Antitrust Studies in Perspective, 104 U. Pa.

L. Rev. 153 (1955); The Schwartz Dissent, 1 Antitrust Bull. 37 (1955); Control of Affiliates, in How to Comply with the Antitrust Laws 234 (Van Cise & Dunn eds. 1954); Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv. L. Rev. 437 (1954); Relations with Affiliated Customers, 1953 A.B.A. Antitrust Section Rep. 214; Potential Impairment of Competition - Impact of Standard Oil Co. of California v. United States on Standard of Legality Under Clayton Act, 98 U. Pa. L. Rev. 10 (1949). Book Reviews: Galbraith, American Capitalism: The Concept of Countervailing Power, 101 U. Pa. L. Rev. 716 (1953); Toulmin, Treatise on the Anti-trust Laws of the United States, 98 U. Pa. L. Rev. 951 (1950); Lynch, Concentration of Economic Power, 95 U. Pa. L. Rev. 440 (1947); Oppenheim, Federal Anti-Trust Laws, 58 Yale L. J. 198 (1948).

48. Books: Law and Structures of Social Action (1956). Articles: Senate Bill No. 11 and Antitrust Policy, 11 Vand. L. Rev. 129 (1957); Foreign Economic Policy and the Antitrust Laws, 40 Minn. L. Rev. 125 (1956); Basic Antitrust Concepts, Symposium on Attorney General's Report, 53 Mich. L. Rev. 1033 (1955); Antitrust Policy Abroad, 49 Nw. U. L. Rev. 569, 713 (1954-5); Role of the Antitrust Laws in the Democratic State, 47 Nw. U. L. Rev. 587 (1952); Antitrust Policy: A Problem in Statecraft, 60 Yale L. J. 1073 (1951). Book Reviews: Brewster, Antitrust and American Business Abroad, 57 Mich. L. Rev. 435 (1959); Fugate, Foreign Commerce and the Antitrust Laws, 57 Mich. L. Rev. 435 (1959); Antitrust Laws: A Comparative Symposium, 56 Colum. L. Rev. 1095 (1955); Latham, Group Basis of Politics: A Study in Basing-point Legislation, 2 J. Public L. 152 (1953); Toulmin, Antitrust Laws of the United States, 36 A.B.A.J. 411 (1950); Toulmin, International Contracts and the Antitrust Laws, 33 Va. L. Rev. 675 (1947).

49. Articles: Rail-Motor Competition: Motor-Carrier Operations by Railroads, 54 Nw. U. L. Rev. 156 (1959); Antitrust Considerations in Motor Carrier Mergers, 56 Mich. L. Rev. 1237 (1958); A Critique of the Doctrine of Primary Jurisdiction in Symposium on Primary Jurisdiction, 13 A.B.A. Antitrust Section Rep. 20 (1958); Competition v. Regulation: The Agricultural Exemption in the Motor Carrier Act, 11 Vand. L. Rev. 543 (1958); Agricultural Exemption in the Motor Carrier Should Not Be Repealed, 43 Va. L. Rev. 677 (1957); The Automobile Franchise Act of 1956: A Dissent, 2 Antitrust Bull. 367 (1957); Resale Price Maintenance in the United States, 3 Bus. L. Rev. 65 (1956); Statute of Limitations in Antitrust Litigation, 16 Ohio S.L.J. 233

(1955) (with Klemme); Resale Price Maintenance, 21 U. Chi. L. Rev. 175 (1954). Book Reviews: Schwartz, Free Enterprise and Economic Organization, 12 J. Legal Ed. 632 (1960); Oppenheim, Federal Antitrust Laws, 58 Mich. L. Rev. 150 (1959); Dirlam, Fair Competition: The Law and Economics of Antitrust Policy, 4 Utah L. Rev. 433 (1955); Edwards, Big Business and the Policy of Competition, 55 Mich. L. Rev. 736 (1957); Thorelli, Federal Antitrust Policy, 23 U. Chi. L. Rev. 719 (1956); How to Comply with the Antitrust Laws, 48 Law Lib. J. 98 (1955); Oppenheim, Cases on Federal Antitrust Laws, 62 Harv. L. Rev. 167 (1948). To complete bibliography see note 17 supra.

50. Articles: Remarks on the Extraterritorial Application of Federal Antitrust Laws in Discussion, 1959 Antitrust L. Sym. 33; Restraint of Trade with Foreign Nations; The Relevance of Business Purpose, 13 J. Bus. L. 792 (1958); Antitrust at Harvard, 7 Harv. L. S. Bull. 6 (1956) (with Turner); Enforceable Competition: Unruly Reason or Reasonable Rules? 46 Am. Econ. Rev. 482 (papers and proceedings 1956). To complete bibliography see note 9 supra.

51. Books: Conference on the Antitrust Laws and the Attorney General's Committee Report (edited with Zaidin, 1955). Articles: Per Se Rules and Boycotts Under the Sherman Act; Some Reflections on the Klor's Case, 45 Va. L. Rev. 1165 (1959); Unfair Trading and Profit Control Act: An American's View, 4 U. Western Austl. Annual L. Rev. 187 (1958); Applicability of the Clayton Act to Potential Competition, 12 A.B.A. Antitrust Section Rep. 128 (1958); The Case for Fair Trade, 44 Ill. B. J. 754 (1956); Introduction to the Antitrust Laws, 38 Chi. B. Record 113 (1956); Antitrust Policy in Distribution, in Symposium on Attorney General's Report, 104 U. Pa. L. Rev. 145 (1955); Section 2(b), in Trade Regulation Series #2 at 211 (Zaidins & Rahl eds. 1955); Conspiracy and the Antitrust Laws, 44 Ill. L. Rev. 743 (1950). Book Reviews: Oppenheim, Federal Antitrust Laws, 12 J. Legal Ed. 630 (1960); Whitney, Antitrust Policies: American Experience in Twenty Industries, 45 Iowa L. Rev. 681 (1960); Handler, Antitrust in Perspective; the Complementary Roles of Rule and Discretion, 57 Mich. L. Rev. 440 (1959); Loevinger, Law of Free Enterprise, 44 Ill. L. Rev. 421 (1949); Oppenheim, Unfair Trade Practices, 3 J. Legal Ed. 654 (1951); Rostow, National Policy for the Oil Industry, 43 Ill. L. Rev. 421 (1948). To complete bibliography see note 14 supra.

52. Articles: Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L. Rev. 50 (1958); Antitrust at Harvard, 7 Harv. L. S. Bull. 6 (1956) (with Brewster);

American Antitrust Laws, 18 Modern L. Rev. 244 (1955). Book Reviews: Thorelli, Federal Antitrust Policy, 65 Yale L. J. 903 (1956). To complete bibliography see notes 8 and 16 supra.

53. Books: The Robinson-Patman Act and its Administration (1958). Articles: "Per Se Illegality" and the Rule of Reason, 12 A.B.A. Antitrust Section Rep. 60 (1958); Limitations on What UN Can Do Successfully; the Proposed UN Program on Restrictive Practices, 1 Antitrust Bull. 441 (1955); Celler Anti-Merger Act: An Administrative Problem in an Economic Crisis, 37 A.B.A.J. 253, 324 (1951); A United Nations Approach to the Cartel Problem, 1 World Trade L. J. 444 (1946); "Proportionately Equal Terms," CCH Symposium on Robinson-Patman Act 51 (1948); Sections 2(a) and (f) and 3, 1946 N.Y.S.B.A. Robinson-Patman Sym. 13; The Federal Trade Commission's Jurisdiction Over Practices in Restraint of Trade - A Large Scale Method of Mass Enforcement of the Anti-trust Laws, 8 Geo. Wash. L. Rev. 365 (1940); Government and Business, 37 Com. L. J. 336 (1932); Antitrust Laws and the Federal Trade Commission, 1914-26, in Some Legal Phases of Corporate Financing, Reorganization and Regulation 287 (1931) (lectures delivered before N.Y. City Bar 1926-30). Changing Conceptions of the Anti-trust Laws, 4 Docket 3488 (1931); Courts, Commissions and the Anti-trust Laws, 4 Docket 3289 (1929), 9 Mich. S.B.J. 97 (1930); Overhauling the Anti-trust Laws, 4 Docket 3243 (1929); Regulation of Business, 1927 N.H.B.A. 15; Antitrust Laws and Federal Trade Commission, 1914-27, 27 Colum. L. Rev. 650, 13 A.B.A.J. 328 (1927); Present Tendencies in the Anti Trust Laws, 1927 N.Y.S.B.A. 311; Price Fixing, Lawful and Unlawful, 1927 Wis. S.B.A. 57, 62 Am. L. Rev. 505 (1928); The Federal Trade Commission and the Clayton Act, in Some Legal Phases of Corporate Financing, Reorganization and Regulation 275 (1917) (lectures delivered before N.Y. City Bar 1916); Webb Bill and the Antitrust Laws, 3 A.B.A.J. 145 (1917); "Unfair Methods of Competition," 25 Yale L. J. 20, 48 Chi. Legal News 148 (1915); "Exclusive Dealer" Agreements, 24 Case & Com. 103 (1913); Patents; Congress and the Supreme Court, Docket 864 (1913); The Patent System Defended in Congress, 25 Green Bay 178 (1913); The Conservation of Business Opportunity, 20 J. Pol. Econ. 613 (1912); The Proposed Patent Law Revision, 26 Harv. L. Rev. 128 (1912); The Sherman Anti-trust Act and the Patent Law, 21 Yale L. J. 433 (1912); German and British Experience with Trusts, 107 Atlantic Monthly 155, Feb. 1911; Business Enterprise and the Law, 192 N. Am. Rev. 694 (1910); Trust Regulation Today, 105 Atlantic Monthly 1, Jan. 1910; Defects of the Sherman Anti-trust Law, 19 Yale L. J. 88 (1909), 55 Ohio L. Bull. 94,

42 Chi. Legal News 223 (1910). Book Reviews: Oppenheim, Unfair Trade Practices, 36 A.B.A.J. 483 (1950); Oppenheim, Federal Antitrust Laws, 34 A.B.A.J. 820 (1948); Kirsh, Trade Associations, 42 Harv. L. Rev. 727 (1929).

54. Articles: Where the Effect May Be to Substantially Lessen Competition or Tend to Create a Monopoly, in An Antitrust Handbook 209 (ABA Section of Antitrust Law 1958), 1953 A.B.A. Antitrust Section Rep. 124; Discussion on Current Antitrust Problems, 15 A.B.A. Antitrust Section Rep. 332 (1959) (with Handler & Austern); Trial of a Big Case on the Criminal Side, 1 Antitrust Bull., 345 (1955); Antitrust Procedure, 1952 Antitrust L. Sym. 19; Judicial Conference Report on the "Big Case": Procedural Problems of Protracted Litigation, 38 A.B.A.J. 289, 348 (1952); Stating the Issues, 1951 Antitrust L. Sym. 13; The Big Case: Procedural Problems in Antitrust Legislation, 64 Harv. L. Rev. 27 (1950); Art of Selecting and Exploiting Half Truths - A Reply to "Giantism" and "Basing Points", 58 Yale L. J. 1068 (1949) (with Quigg); Rejoinder, 58 Yale L. J. 1090 (1949) (with Quigg); Should Law of Section 2 Be Revised? CCH Symposium on Robinson-Patman Act 155 (1948). Book Reviews: Handler, Antitrust in Perspective: The Complementary Roles of Rule and Discretion, 11 J. Legal Ed. 119 (1958); Mason, Controlling World Trade, 32 Va. L. Rev. 1210 (1946).

55. Articles: Price Discrimination and the Small Businessman, 16 A.B.A. Section Rep. 94 (1960); Brokerage v. Service Payments: Another Look at Section 2(C), in Trade Regulation Series #3 at 57 (Timburg ed. 1956). To complete bibliography see note 10 supra.

56. See Articles cited supra, n.11.

57. Articles: Restrictions Normally and Reasonably Within the Patentee's Pecuniary Reward, 15 A.B.A. Antitrust Section Rep. 318 (1959); Report of the Attorney General's Antitrust Committee Three Years After, 26 Geo. Wash. L. Rev. 669 (1958); Unenforceable Contracts and Other Consequences, in An Antitrust Handbook (ABA Section on Antitrust Law 1958), 1954 A.B.A. Antitrust Section Rep. 159; Premises and Scope of the Patent Chapter, in Symposium on Attorney General's Report, 104 U. Pa. L. Rev. 145 (1955); Problem of Patent Interchange and the Report of the Attorney General's National Committee, 1 Antitrust Bull. 165 (1955); Patent Pools, in How to Comply with the Antitrust Laws 256 (Van Cise & Dunn eds. 1954), 1952 Antitrust L. Sym. 167; Patents and Antitrust Laws, in Symposium on Antitrust Law, 1950 U. Ill. L. F. 491 (1950) (with Johnson); Supreme Court and a Changing Antitrust

Concept, 97 U. Pa. L. Rev. 309 (1949); Patent Combinations and the Antitrust Laws, 17 Geo. Wash. L. Rev. 59 (1948); The Tangle of Mercoid Case Implications, 27 J. Pat. Off. Soc'y 230 (1945), 13 Geo. Wash. L. Rev. 61 (1944); Patent Reform and the 1943 Antitrust or Anti-Patent Law, 25 J. Pat. Off. Soc'y 580 (1943). Book Reviews: Van Cise, Understanding the Antitrust Laws, 42 A.B.A.J. 951 (1956).

58. Articles: Remarks and Introductions, 1960 Antitrust L. Sym. 71 passim; Developments in Antitrust During the Past Year, 15 A.B.A. Antitrust Section Rep. 74 (1959) (joint project of Oppenheim, Anderson, Sprunk, Austin, Cutler, Decker, Levi, Ruddock, Austern, Hollabaugh with final text by Oppenheim); Discussion on Current Antitrust Problems, 15 A.B.A. Antitrust Section Rep. 332 (1959) (with Handler & McAllister); Aberrant Antitrust (collateral enforcement), in Symposium on Primary Jurisdiction, 13 A.B.A. Antitrust Section Rep. 20 (1958); Discussion on Effects on Certain Antitrust Decrees Involving Patents as a Major Factor, 2 Pat., T.M. & Cpyrt. J. Res. & Ed. 66 (1958); Introductory Remarks on How to Comply With Section 2 of Clayton Act, as amended by Robinson-Patman Act, 1957 Antitrust L. Sym. 61; The Parentage and Administrative Ontogeny of the Federal Trade Commission, 1955 Antitrust L. Sym. 83; Dealing with Uncertainties, in How to Comply with the Antitrust Laws 343 (Van Cise & Dunn eds. 1954); Tabula in Naugragio - Administrative Style - Some Observations on the Robinson-Patman Act, 1953 Antitrust L. Sym. 105; The Federal Trade Commission Act, 1954 Antitrust L. Sym. 24; Inconsistencies in the Law, 1951 Antitrust L. Sym. 158; The Supreme Court and Section 3 of the Clayton Act - The Standard Oil of California Decision, 1950 Antitrust L. Sym. 43; Section 2(c), 1946 N.Y.S.B.A. Symposium on Robinson-Patman Act 37. Book Reviews: Berle, Power Without Property, 12 Stan. L. Rev. 697 (1960); Lamb & Kittelle, Trade Association Law and Practice, 56 Mich. L. Rev. 149 (1957).

1. ALI, Report on Possible Work in the Field of Antitrust and Patent Law (1953).

2. Id. at 12.

3. Att'y Gen. Nat'l Comm. Antitrust Rep. (1955).

4. Bickel & Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case, 71 Harv. L. Rev. 1, 3 (1957).

5. My views in this respect are closer to those of Mason, who said:

> "[The Attorney General's Committee's] professionally deft and skillful exegesis discovers a uniform and consistent body of law from the Steel Case to date and, like the devil quoting scripture, the Report quotes a corroborative excerpt from almost every important decision. This, I submit, is a relatively easy thing to do. Pareto once remarked that the statements of Karl Marx are like bats; from one angle they resemble birds while from another view they look like mice. This observation is equally apropos with respect to antitrust decisions. It is possible for the skillful reader to buttress almost any preconceived notion of what the antitrust laws are about by judicious citation of chapter and verse." Mason, Economic Concentration and the Monopoly Problem, 391 (1957).

than to those of Rostow:

> "The Attorney General's National Committee to Study the Antitrust Laws, which issued its Report in 1955, made an unexpected discovery. The sixty diverse members of the group found that there was an antitrust law, and not merely a vast heap of cases and statutes, rules and exceptions. With refreshing unanimity, they concluded that on the whole they knew what the law was. And they found the decisive elements of the law they knew stated, or at least foreshadowed, in Chief Justice White's much abused opinion in the Standard Oil case." Rostow, Planning for Freedom, 279-80 (1959).

6. Oppenheim, Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy, 50 Mich. L. Rev. 1139 (1952).

7. Id. at 1190.

8. Oppenheim, Cases on the Federal Antitrust Laws, 293, (1959).

9. Oppenheim, supra n. 6 at 1157.

10. Id. at 1159.

11. Ibid.

12. Id. at 1157-58.

13. Handler, Antitrust in Perspective: The Complementary Rules of Rule and Discretion (1957).

14. Packer, Book Review of Antitrust in Perspective, 67 Yale L. J. 1141 (1958).

15. Rostow, Planning for Freedom, ch. 11 (1959).

16. Rostow, The New Sherman Act: A Positive Instrument of Progress, 14 U. Chi. L. Rev. 567 (1947).

17. Rostow, Planning for Freedom, 300 (1959).

18. Id. at 299.

19. Kaysen & Turner, Antitrust Policy, 110 (1959).

20. Wechsler, Legal Scholarship and the Criminal Law, in University of Michigan Law School, Conference on Aims and Methods of Legal Research, 126, 128 (Conard ed., 1955).

21. See bibliographical footnotes 43-58, supra, section IV.

22. Hale, Agreements Among Competitors - Incidental and Reasonable Restraints of Trade, 33 Minn. L. Rev. 331 (1949).

23. Id. at 386.

24. "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." 310 U.S. 150, 223-24 (1940).

25. Brandeis, J. in Standard Oil Co. (Indiana) v. United States, 283 U.S. 163, 179 (1931).

26. The Per Se Illegality of Price-Fixing - Sans Power, Purpose or Effect, 19 U. Chi. L. Rev. 837 (1952).

27. Kiefer-Stewart Co. v. Seagram & Sons, Inc., 340 U.S. 211 (1951).

28. Bork, Ancillary Restraints and the Sherman Act, 15 A.B.A. Antitrust Section Rep. 211 (1959).

29. United States v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953).

30. United States v. Morgan, 118 F. Supp. 621 (S.D.N.Y. 1953).

31. Steffen, The Investment Banker's Case: Some Observations, 64 Yale L. J. 169 (1954); Whitney, The Investment Banker's Case - Including a Reply to Professor Steffen, 64 Yale L. J. 319 (1955); Steffen, The Investment Bankers' Case: Observations in Rejoinder, 64 Yale L. J. 863 (1955); The Investment Bankers' Case: A Surrejoinder, 64 Yale L.J. 873 (1955).

32. But see Note, The Investment Bankers Case: The Use of Semantics to Avoid the Per Se Illegality of Price Fixing, 63 Yale L. J. 399 (1954).

33. See bibliography in Oppenheim, Federal Antitrust Laws 662 n. 39 (2d ed. 1959).

34. Rahl, Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case, 45 Va. L. Rev. 1165 (1959).

35. CCH, The Federal Antitrust Laws 294 (1952).

36. Rostow, The New Sherman Act: A Positive Instrument of Progress, 14 U. Chi. L. Rev. 567 (1947).

37. See, e.g., Morton Salt Co. v. United States, 235 F.2d 573 (10th Cir. 1956); C-O-Two Fire Equipment Co. v. United States, 197 F.2d 489 (9th Cir. 1952), cert. denied, 344 U.S. 892 (1952); Peveley Dairy Co. v. United States, 178 F.2d 363 (8th Cir. 1949), cert. denied, 339 U.S. 942 (1950); United States v. Twentieth Century-Fox Film Corp., 137 F. Supp. 78 (S.D. Calif. 1956).

38. Milgram v. Loew's Inc., 192 F.2d 519 (3d Cir. 1951), certiorari denied, 343 U.S. 929 (1952).

39. Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954).

40. See, e.g., references in Packer, Book Review, 67 Yale L. J. 1141, 1144-45 n.16 (1958). For a more restrained appraisal see Rostow, Planning for Freedom, 299 (1959):

> "It is always good evidence of combination or conspiracy to show that in a situation of oligopoly the defendants behave in uniform and parallel ways, as if they had tacitly agreed to coordinate their price policy. If, on the basis of such evidence, a jury, a lower court, or the Federal Trade Commission finds that the defendants have reached an understanding, that finding will not be disturbed on appeal. On the other hand, guilt and responsibility under the law must be individual, and not imputed by association, or even without it. If the trial tribunal is satisfied, despite such evidence, that the defendants' decisions were independent and not collective, and did not stem from a collusive agreement, tacit or express, the appellate courts will not usually reverse that finding of fact [citing Theatre Enterprises]."

41. Director & Levi, Trade Regulation, 51 Nw. U. L. Rev. 281 (1956).

42. Bowman, Tying Arrangements and the Leverage Problem, 67 Yale L. J. 19, 23-24 (1957).

43. Turner, Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L. Rev. 50, 63 n.42 (1958).

44. See bibliography collected in Handler, Antitrust in Perspective - The Complementary Roles of Rule and Discretion, 136 n.8 (1957).

45. Standard Oil of California & Standard Stations, Inc., v. United States, 337 U.S. 293 (1949).

46. Lockhart & Sacks, Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act, 65 Harv. L. Rev. 913 (1952).

47. Robinson, Restraints on Trade and the Orderly Marketing of Goods, 45 Cornell L. Q. 254 (1960). The phrase appears to be the coinage of Mr. Robinson's senior partner, Milton Handler. See 14 The Record 349 (1959).

48. Rifkind, Division of Territory Under the Antitrust Laws, 1953 Antitrust L. Sym. 173.

49. See bibliography collected in Oppenheim, Federal Antitrust Laws, 181 n.1 (2d ed. 1959).

50. Bowman, Prerequisites and Effects of Resale Price Maintenance, 22 U. Chi. L. Rev. 825 (1955).

51. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).

52. Rahl, Resale Price Maintenance, State Action, and Antitrust Laws; Effect of Schwegmann Bros. v. Calvert Distillers Corp., 46 Ill. L. Rev. 349 (1951).

53. 317 U.S. 341 (1943).

54. See commentary on Schwegmann, 1949-52 Index to Legal Periodicals 870 (1952). The comment by Looper, 5 Okla. L. Rev. 250 (1952) was a more careful treatment.

55. Edwards, The Price Discrimination Law (1959).

56. Att'y Gen. Nat'l Comm. Antitrust Rep. 155-221 (1955).

57. See, e.g., 1957 Antitrust Law Symposium on How to Comply with the Robinson-Patman Act; Symposium on Robinson-Patman Act, 152 A.B.A. Antitrust Section Rep. 60 (Annual Meeting) especially, Levi, The Robinson-Patman Act - Is It in the Public Interest? at p. 60; Austin, Price Discrimination and the Small Businessman, 16 A.B.A. Antitrust Section Rep. 94 (1960); Oppenheim, Selected Developments in the Courts and the Federal Trade Commission, 16 A.B.A. Antitrust Section Rep. 37, 56-69 (1960); Oppenheim, Developments in Antitrust During the Past Year, 16 A.B.A. Antitrust Section Rep. 74, 120 (1960); Shniderman, Cost Justification under the Robinson-Patman Act - The FTC Advisory Committee's Report, 25 U. Cinn. L. Rev. 389 (1956); Comments on the Anheuser-Busch case, 12 Stan. L. Rev. 460; 108 U. Pa. L. Rev. 116 (1959).

58. Standard Oil of Indiana v. Federal Trade Commission, 340 U.S. 231 (1951).

59. See 1949-52 Index to Legal Periodicals 876.

60. Edwards, op. cit. supra note 55, at 580-83.

61. McGee, Price Discrimination and Competitive Effects: The Standard Oil of Indiana Case, 23 U. Chi. L. Rev. 398 (1956). See also Douglas & Wallace, Antitrust Policies and the "New" Attack on the Federal Trade Commission, 19 U. Chi. L. Rev. 684, 703-710, and Weisberg, Price Discrimination in Gasoline Marketing: The Detroit Jobbers Case, 19 U. Chi. L. Rev. 58 (1951), advancing different views.

62. See, e.g., Morton Salt Co. v. United States, 334 U.S. 37 (1948).

63. Federal Trade Commission v. Simplicity Pattern Co., 360 U.S. 55 (1959).

64. Federal Trade Commission v. Henry Broch & Co., 363 U.S. 1158 (1960).

65. United States v. General Motors Acceptance Corp., 121 F.2d 376 (7th Cir. 1941).

66. United States v. Lorain Journal Co., 92 F. Supp. 794, aff'd 342 U.S. 143 (1951).

67. United States v. New York Great A & P Tea Co., 173 F.2d 79 (7th Cir. 1949).

68. Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953).

69. See bibliography in Oppenheim, Federal Antitrust Laws 283-84 n.59, (2d ed. 1959).

70. The most careful treatment is McQuade, Conspiracy, Multi-Corporate Enterprises and Section 1 of the Sherman Act, 41 Va. L. Rev. 183 (1955).

71. See bibliography in Oppenheim, Federal Antitrust Laws, 429 n.94 (2d ed. 1959).

72. Adelman, Integration and Antitrust Policy, 63 Harv. L. Rev. 27 (1949).

73. Bork, Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception, 22 U. Chi. L. Rev. 157 (1954).

74. See bibliography in Oppenheim, Federal Antitrust Laws 430 n.95 (2d ed. 1959).

75. Hale & Hale, Market Power - Size and Shape Under the Sherman Act, ch. 5 (Trade Regulation Series 1958).

76. Kaysen & Turner, Antitrust Policy, 119-27 (1959).

77. Kessler & Stern, Competition, Contract, and Vertical Integration, 69 Yale L. J. 1 (1959).

78. Kessler, Automobile Dealer Franchises: Vertical Integration by Contract, 66 Yale L. J. 1135 (1957). See also the student notes in 70 Harv. L. Rev. 1239 (1957), 52 Nw. U. L. Rev. 253 (1957) & 9 Stan. L. Rev. 76 (1957). See generally bibliography in Oppenheim, Federal Antitrust Laws 680 n.15 (2d ed. 1959).

79. See bibliography in Oppenheim, Federal Antitrust Laws 543-44 (2d ed. 1959).

80. Markham, Merger Policy Under the New Section 7: A Six Year Appraisal, 43 Va. L. Rev. 489 (1957).

81. Neal, The Clayton Act and the Transamerica Case, 5 Stan. L. Rev. 179 (1953). See particularly pp. 182-91 for discussion of the difficulties of applying Section 7's test of illegality.

82. United States v. E. I. DuPont De Nemours & Co., 353 U.S. 586 (1957). See bibliography in Oppenheim, Federal Antitrust Laws 535-36 n.71 (2d ed. 1959); United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D.N.Y. 1958).

83. Adelman, The Du Pont-General Motors Decision, 43 Va. L. Rev. 873 (1957); Adelman, Economic Aspects of the Bethlehem Opinion, 45 Va. L. Rev. 684 (1959).

84. Kaysen, United States v. United Shoe Machinery Corp. (Harvard Economic Studies 1958).

85. Stocking & Mueller, The Cellophane Case, 45 Am. Econ. Rev. 29 (1955).

86. Turner, Antitrust Policy and the Cellophane Case, 70 Harv. L. Rev. 281 (1956).

87. See bibliography in Oppenheim, Federal Antitrust Laws 298 (2d ed. 1959).

88. Rahl, Resale Price Maintenance, State Action, and Antitrust Laws: Effect of Schwegmann Bros. v. Calvert Distillers

Corp., 46 Ill. L. Rev. 349 (1951).

89. Lovell, Sales Below Cost Prohibitions: Private Price Fixing Under State Law, 57 Yale L. J. 391 (1948).

90. Insurance Antitrust Moratorium Act (McCarran-Ferguson Act) § 2, 59 Stat. 34 (1945), as amended, 61 Stat. 448, 15 U.S.C.A. § 1012 (1947).

91. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1943).

92. See bibliography in Oppenheim, Federal Antitrust Laws 4-5 n.11 (2d ed. 1959).

93. See, e.g., Report of the Special Committee to Study the New York Antitrust Laws of the New York State Bar Section on Antitrust Law (1957).

94. An expanded enforcement program has been launched by the incumbent Attorney General. At the same time, a committee of the State Bar Association is considering proposals for legislative revision.

95. See bibliography collected in Oppenheim, Federal Antitrust Laws 925 n.8 (2d ed. 1959).

96. Brewster, Antitrust and American Business Abroad, chs. 6-10 (1958).

97. Id., ch. 13.

98. See, e.g., id. at 15, 178, 308 & 377.

99. United States v. Hutcheson, 312 U.S. 219 (1941).

100. Att'y Gen. Nat'l Comm. Antitrust Rep. 293-305 (1955).

101. E.g., Cox, Labor and the Antitrust Laws - A Preliminary Analysis, 104 U. Pa. L. Rev. 252 (1955); Smith, Antitrust and Labor, 53 Mich. L. Rev. 1189 (1955).

102. Kaysen & Turner, Antitrust Policy 208-12 (1959).

103. E.g., Pound, Labor Unions and the Concept of Public Service (Am. Enterprise Ass'n 1959); Chamberlin, Labor Unions and Public Policy (Am. Enterprise Ass'n 1948); Richberg, Labor Union Monopoly - A Clear and Present Danger (1957).

104. See bibliography collected in Oppenheim, Federal Antitrust Laws 29 n.56 (2d ed. 1959). The articles by Schwartz, Von Mehren and Jaffe provide a spectrum of views; Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv. L. Rev. 436 (1954); Von Mehren, Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction, 67 Harv. L. Rev. 929 (1954); Jaffe, Primary Jurisdiction Reconsidered, 102 U. Pa. L. Rev. 577 (1954).

105. See, e.g., Maryland & Va. Milk Products Ass'n v. United States, 362 U.S. 458 (1960); United States v. RCA, 358 U.S. 334 (1959).

106. See, e.g., Chronicle Pub. Co. v. N.B.C., C.A. No. 39242, N.D. Calif. raising for the first time the question whether FCC approval of a TV Station acquisition is exempted from antitrust scrutiny by the last paragraph of Section 7 of the Clayton Act.

107. See, e.g., Att'y Gen. Nat'l Comm. Antitrust Rep. 341-75 (1955) and subsequent articles on enforcement recommendations of the Report: e.g., Antitrust Administration and Enforcement and the Attorney General's Committee Report: A Brief Symposium, 50 Nw. U. L. Rev. 305 (1955) (Cummings, Stedman & McConnell); Bernhard, Uncovering Violations of the Antitrust Laws: From Grand Jury Subpoena to Civil Investigative Demand, 24 Geo. Wash. L. Rev. 34 (1955); Chadwell, Antitrust Administration and Enforcement, 53 Mich. L. Rev. 1133 (1955); Cummings, Antitrust Administration and Enforcement, in A Symposium Conference on the Antitrust Laws and the Attorney General's Report 163 (Trade Regulations Series #2 1955); Segal & Mullinix, Administration and Enforcement, 104 U. Pa. L. Rev. 285 (1955).

108. See bibliography in Oppenheim, Federal Antitrust Laws 1028 n.1 (2d ed. 1959). See especially McAllister, The Big Case, 64 Harv. L. Rev. 27 (1950); Dession, The Trial of Economic and Technological Issues of Fact, 58 Yale L. J. 1019, 1242 (1949).

109. See bibliography in Oppenheim, Federal Antitrust Laws 1035 n.3 (2d ed. 1959). The best of the many recent studies are Clark, The Treble Damage Bonanza, 52 Mich. L. Rev. 363 (1954); Comment, 61 Yale L. J. 1010 (1952).

110. See bibliography in Oppenheim, Federal Antitrust Laws 1058, n.29 (2d ed. 1959).

111. See the studies published in the Patent, etc. J. Res. & Ed; cited supra, Section IV, n.42.

112. Whitney, Antitrust Policies - American Experience in Twenty Industries (1958).

1. Wechsler, The Legal Scholar and the Criminal Law, in University of Michigan Law School, The Aims and Methods of Legal Research 126 (Conard ed. 1955).

1. Note, Restricted Channels of Distribution Under the Sherman Act, 75 Harv. L. Rev. 795 (1962).

2. Competition in the Regulated Industries: Transportation (1961).

3. Price Discrimination Under the Robinson-Patman Act (1962). Rowe's book, as well as Fulda's, is a volume in the Trade Regulation series edited by Oppenheim, who is due our gratitude for encouraging the execution of these large-scale projects.

4. 107 U. Pa. L. Rev. 585, 108 id. 775, 109 id. 311, 110 id. 57.

5. Antitrust and Specific Economic Regulation: An Introduction to Comparative Analysis, 19 A.B.A. Antitrust Section 261 (1961).

6. Diversification of Ownership in the Regulated Industries -- The Folklore of Regulation, 19 id. 362 (1961).

7. The Parke, Davis - Colgate Doctrine: The Ban on Resale Price Maintenance, 1960 The Supreme Court Review 258.

8. The Tampa Electric Case and the Problem of Exclusive Arrangements Under the Clayton Act, 1961 id. 267.

9. The phrase is attributed to T. R. Powell in Kurland, Of Church and State and the Supreme Court, 29 U. Chi. L. Rev. 1, 2 (1961).

10. See Henkin, Some Reflections on Current Constitutional Controversy, 109 U. Pa. L. Rev. 637, 652-55 (1961).

11. Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226 (1960).

12. Id. at 274.

13. 1961 The Supreme Court Review at 332.

14. 75 Harvard L. Rev. 655 (1962).

15. Id. at 681.